3-1700-9161-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by David Beaulieu, Commissioner, Department of Human Rights,

Complainant,

v.

City of Minneapolis,

Respondent.

PARTIAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles, commencing July 15, 1996, and was heard July 15-16, 22-26, September 9-13, 16-20, 23-24, October 7, 22-25, 28-31, November 4-5, December 30-31, 1996 and January 6-9, 1997, in Courtroom 170 at the University of Minnesota Law School, 229 - 19th Avenue South, Minneapolis, Minnesota 55455. At the close of the hearing, the record remained open for the filing of post-hearing briefs. The record closed upon submission by the parties of recommended findings on July 18, 1997.

Carl Warren, Esq. and certified student attorneys Matthew Zenner, Jerrie Hayes, Geoff Crane, Jeffery Brockmann and Dave Walters, of the University of Minnesota Law School Civil Practice Clinic, 190 Law Center, 229 - 19th Avenue South, Minneapolis, Minnesota 55455, appeared on behalf of the Complainant.

Deborah A. Styles, Assistant City Attorney, and C. Lynne Fundingsland, Acting Deputy City Attorney, 333 South Seventh Street, Room 300, Minneapolis, Minnesota 55402, appeared on behalf of Respondent.

NOTICE

This Order is **not** a final decision in this case.[1] A final decision incorporating both liability and damages will be issued in accordance with Minn. Stat. § 363.071, subd. 2 and 3, after a determination of other costs and fees.

STATEMENT OF ISSUES

Whether the City of Minneapolis Police Department engaged in unlawful marital status discrimination against Katherine and Donald Smulski in violation of Minn. Stat. § 363.03, subd. 1 (2) (c)?

Whether the City of Minneapolis Police Department engaged in unlawful reprisals against Katherine and Donald Smulski in violation of Minn. Stat. § 363.03, subd. 7?

Whether the City of Minneapolis Police Department engaged in unlawful sex discrimination against Katherine Smulski and other female officers in violation of Minn. Stat. § 363.03, subd. 1(2) (c)?

If violations of Minn. Stat. ch. 363 have occurred, what are the appropriate damages, remedies and other relief?

Based upon all the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. Procedural and Jurisdictional Findings

1. On November 9, 1990, Donald Smulski and Katherine Smulski each filed a charge of discrimination against the City of Minneapolis Police Department with the Minnesota Department of Human Rights. Copies of each of the charges were served upon the City of Minneapolis Police Department.

2. The Minnesota Human Rights Department conducted an investigation into the allegations contained in the charges of discrimination filed by Donald Smulski and Katherine Smulski.

3. On July 19, 1991, the Department of Human Rights found probable cause to credit the allegation that the City of Minneapolis Police Department had committed unfair discriminatory practices against Donald Smulski and Katherine Smulski.

4. The Minnesota Department of Human Rights attempted unsuccessfully to conciliate each of the charges of discrimination.

5. On October 6, 1994, the Commissioner of Human Rights issued a Complaint and served a copy of that Complaint upon the City of Minneapolis. A Prehearing Order issued on November 18, 1994 established March 28, 1995 as the date for trial.

6. After a continuance, the parties agreed to attempt to resolve the dispute by settlement conference. On or about June 7, 1995, the parties began settlement discussions before a Settlement Judge at the Office of Administrative Hearings. In a

letter dated March 7, 1996, the trial Judge was informed that settlement discussions were unsuccessful and the parties requested a date certain for trial. The trial Judge established July 15, 1996 as the date for commencement of trial in this matter.

7. The trial commenced on July 15, 1996 and continued for a total of 36 days. The trial days were spread out over seven months due to other commitments previously scheduled by the Judge and the Parties.

II. **COUNT I: Marital Status Discrimination**

A. Katherine and Donald Smulski

8. Donald Smulski and Katherine Smulski are married and reside at 14257 Durning Avenue, Apple Valley, Minnesota 55124. They are employed by the City of Minneapolis as police officers. They joined the Minneapolis Police Department (hereinafter also referred to as "MPD") on February 23, 1987, as part of the same incoming class of recruits. Prior to joining the MPD, Donald Smulski had ten years previous experience as a police officer in Highland, Indiana. (D. Smulski, V. 4, 709.)[2]

9. Katherine Smulski nee Berg, graduated from Richfield High School in 1982. While in high school, she chose law enforcement for her life-long career. (K. Smulski, V.1, 47-48). She attended Normandale Community College from 1982 until 1984 where she earned an associate of arts degree and continued at Mankato State for two years where she obtained a bachelor of science degree in law enforcement. She attended the Hibbing Vo-Tech skills training program for the purpose of obtaining skills necessary to become a licensed peace officer in the State of Minnesota. She officially joined the Minneapolis Police Department on February 23, 1987. Her goal at the time she joined the MPD was to gain three to five years' experience working for a large police department like the MPD and then work for a suburban police department. (K. Smulski, V. 1, 49.)

B. Assignment as Partners

10. After completing six months of field training, Donald Smulski and Katherine Smulski were assigned as patrol officers to the Fourth Precinct C Shift in about September 1987. (D. Smulski, V. 4, 713; K. Smulski, V. 1, 49.) After about 1-1/2 months on the C Shift, Katherine Smulski and Donald Smulski were assigned to Squad[3] 430 along with a third officer, Steve Mosey. (K. Smulski, V. 1, 53.) The Fourth Precinct is divided into districts patrolled by a Squad assigned to the District. (Ex. 120.) Each month, officers are assigned to a Squad District by the shift commander so that each Squad District has been assigned personnel for the month and the total number of personnel for each shift daily meets a mandatory minimum number of officers.

11. The Fourth Precinct had four shifts: A, B, C and the Power Shift. The A, B and C Shifts were "rotating shifts" that worked a different shift of hours each month. The rotating times were from 6:00 a.m. to 2:00 p.m., 2:00 p.m. to 10:00 p.m., and 10:00 p.m. to 6:00 a.m. (K. Smulski, V. 1, 56-57.) The Power Shift's hours, however,

were always from 7:00 p.m. to 3:00 a.m. The rotating shift from 10:00 p.m. to 6:00 a.m. was also referred to as the "Dog Watch". (Diaz, V. 29, 5063.)

12. Katherine and Donald Smulski worked on the C Shift from May 1987 to July 1988. They worked together well as partners and earned above-average performance evaluations, letters of appreciation from citizens, and recommendations for awards from their supervisors. (Ex. 5, 31; Ex. 7, 27.) During this period, Donald Smulski and Katherine Smulski began to develop a romantic relationship in addition to their professional relationship. They started dating in June 1988 and eventually married on September 7, 1990. (K. Smulski, V. 1, 66.)

13. In July 1988, Donald Smulski and Katherine Smulski requested and were granted a transfer to the Fourth Precinct Power Shift. (K. Smulski, V. 1, 58.) They wanted to work on the Power Shift for two reasons: The hours never varied and officers were exposed to more high-priority, in-progress calls, so-called "hot calls". (K. Smulski, V. 1, 58.) They worked on the Power Shift from July 1988 to September 1989. Their supervisors on the Power Shift were Sgt. Jerry Larson and Sgt. Francis Dallman. (K. Smulski, V. 1, 64.) While on the Power Shift, Donald Smulski and Katherine Smulski were assigned together as partners on a permanent Squad car, Squad 476.

14. Donald Smulski and Katherine Smulski continued to perform well on the Power Shift. (Ex. 5, 31, Ex. 7, 27.) Sgts. Francis Dallman and Jerry Larson were their supervisors on the Power Shift. Sgt. Dallman described Katherine Smulski as "absolutely the best female officer I have worked with on my shift." (Ex. 16, 7.) Sgt. Larson described Donald Smulski as a "hard charger" (Larson, V. 21, 3554.) Referring to both Donald and Katherine Smulski, Larson testified, "[T]hey were looking, they were digging, always finding something to do." (Id.) A co-worker described them as “a couple of the best" and "Top Cops." (Clemons, V. 6, 1240-41.) Officer Mary Ketzner described Katherine and Donald Smulski as "good cops" and further explained what she meant by stating:

> Everybody liked them. They answered lots of calls, they took all the hot calls. They were, a lot of times, the first car in.

(Ketzner, V. 7, 1276-77.) In connection with their transfer from the Power Shift, Sgt. Dallman stated:

> They were both good officers, excellent officers, and I didn't know who I was going to get to replace them, and I hated to see them go.

(Dallman, V. 16, 2801.)

15. During their time on the Power Shift, Donald Smulski and Katherine Smulski regularly requested the same days off. (K. Smulski, V. 1, 66.) In August 1988, they began living together.

16. Power Shift supervisors were aware that Donald Smulski and Katherine Smulski had a personal relationship outside of work. (Dallman, V. 16, 2798-99; Larson, V. 21, 3561.) These same supervisors testified that the personal relationship between Donald Smulski and Katherine Smulski did not concern them, and that their requesting the same days off never created any scheduling or other problem for the shift supervisors. (Id.) Prior to the circumstances giving rise to this case, no supervisor or any other person in the MPD ever objected to Katherine and Donald Smulski taking the same days off; nor did anyone ever suggest that it was inappropriate for them, as partners on the same Squad, to take the same days off. (K. Smulski, V. 1, 84-87.)

17. Katherine and Donald Smulski, as a team, were effective, successful police officers who made numerous arrests compared to some of their colleagues at the Fourth Precinct. One example of their effectiveness in making arrests is seen in how often they were called to testify in court. The MPD subpoena log sheet indicates that between September 9 and October 12, 1989, they were subpoenaed six times, about twice as often as anyone else listed on the sheet for this period. (Ex. 4, 50-51.)

18. Donald Smulski and Katherine Smulski transferred from the Power Shift back to the Fourth Precinct C Shift on October 6, 1989. (K. Smulski, V. 1, 61.) The C Shift supervisors at this time were Lt. Joey Winslow, Sgt. James Violette, and Sgt. Anthony Diaz. (Ex. 1, 3).

19. Sometime during the time that the Smulskis' worked on the Power Shift, Inspector William Jones[4] replaced Captain Smith as commander of the Fourth Precinct. (K. Smulski, V. 1, 64.) An Inspector[5] is appointed by, and serves at the pleasure of, the Chief of Police.

C. Communications Problems With the County Attorney's Office.

20. On October 10, 1989, Donald Smulski and Katherine Smulski received notification from County Attorney's Office Intern Tina Thomson that they were to be on standby court time from 9:00 a.m. - 10:00 a.m. on October 13 for a juvenile matter. (Ex. 4, 15.) During the conversation Donald Smulski learned that the prosecuting attorney was Diane Ward with whom Donald and Katherine Smulski had previously had some problems. Donald Smulski informed Ms. Thomson of their past difficulties with Diane Ward and expressed concern that, because of their past problems, another attorney might be better suited to handle the case. (Ex. 4, 32.)

21. When October 13 came, Donald Smulski and Katherine Smulski, who had worked until 6:00 a.m. that morning, complied with the standby court time requirements and made sure they were available by phone during that hour. At 10:00 a.m. they had not received a phone call and proceeded to turn on their answering machine and go to bed. (Ex. 4, 16.) At 10:05 a.m. Desk Duty officer T. Wampach left a message on their machine advising that they were needed in court. Upon awaking at about 12:30 p.m. and hearing the message, Donald Smulski made several phone calls to attempt to resolve the situation. (Ex. 4, 16.)

22. Donald Smulski learned that the County Attorney's office was prosecuting two cases against the same defendant. The first proceeding involved a case in which

two other officers were to serve as witnesses. The case that needed Donald Smulski and Katherine Smulski was scheduled to begin at the conclusion of the first proceeding. Donald Smulski was given two different times that the first proceeding might end. Ultimately their testimony was not needed because the second case was resolved without a hearing. (Ex. 4, 18). However, Donald Smulski's statement that another attorney may be more suitable for the case was treated by the County Attorney's Office as a refusal to testify. The matter was reported to Inspector Jones on October 12, 1989.

23. On September 9, 1989 Donald and Katherine Smulski were issued subpoenas to appear in court on September 21, 1989 in the matter of State v. Carl L. Robinson. (Ex. 4, 49.) When the scheduled court date came, Donald and Katherine Smulski were notified that a continuance had been granted, but the future date was not yet set. (K. Smulski, V. 1, 133.) The case was continued until October 17, 1989. The new trial date was not communicated to Donald and Katherine Smulski. (K. Smulski, V. 1, 133-34.)

24. Efforts were made to reach the officers by telephone at their home to inform them of the new trial date. On Monday, October 16, 1989, the Court Liaison Officer, officer Anderson attempted without success to reach the officers by telephone at their home.

25. The trial in the matter of State v. Carl L. Robinson commenced on Tuesday, October 17. Donald and Katherine Smulski were not present at the commencement of the trial. October 17, 1989, was a previously scheduled day off. (Ex. 1.) At this time they were working "Dog Watch" and they were not scheduled to return to work until 10:00 p.m. October 17.

26. When Donald and Katherine Smulski reported for work the night of October 17, Sgt. Violette informed them that they had missed a court date that morning and that they were to report to the County Attorney's Office the next morning at 8:00 a.m. (Ex. 4, 17.) After working all night they arrived at Assistant County Attorney Steve Redding's office at 8:00 a.m. but he was not there. (Ex. 4, 18.)

27. Donald and Katherine Smulski inquired several times as to where Mr. Redding was and expressed their displeasure at having to wait. They expressed this displeasure in a lobby area where there were other persons waiting for the beginning of court proceedings that day. Donald Smulski told County Attorney's Office personnel "they were going to leave because they had worked all night, and they had better things to do." Katherine Smulski reportedly said "she was sick and tired of this." (Ex. 4, 26.) Under the circumstances the County Attorney's Office personnel found their behavior "very rude and embarrassing." (Id.) They were asked to wait and not to leave.

28. They left the lobby and went to the Court Liaison Officer, Steve Anderson, the person responsible for coordinating court time for police officers. They sought Officer Anderson's assistance in locating Steve Redding. Steve Redding arrived in his office at approximately 8:50 a.m. and was upset that the officers were not in his office. The Court Liaison Officer, Steve Anderson, called Mr. Redding's office and found that he had just arrived. The officers proceeded to the assigned courtroom where they met

Steve Redding outside the courtroom. (Ex. 4, 18-19.) Mr. Redding, having little time to speak with them, gave them both copies of their reports and told them he would call them to testify as soon as possible. They both later testified as prosecution witnesses. (Ex. 4, 19.) Donald and Katherine Smulski also explained to attorney Redding that they had never received a subpoena or other notification for the new court date. (Ex. 4, 37.)

D. Termination of Partnership

29. On October 12, 1989, Inspector Jones received a phone call from Lisa Eder, a legal services specialist with the Hennepin County Attorney's office. Ms. Eder stated that Donald Smulski had refused to testify in a case being prosecuted by Assistant County Attorney Diane Ward because they did not get along. (Ex. 4, 23.)

30. On the morning of October 17, 1989, Inspector Jones received a call from court liaison Officer Steve Anderson who said that Officers Katherine Smulski and Donald Smulski were needed to testify in the court case described above and that he could not contact them. Inspector Jones directed the desk officer, Officer T. Wampach, to attempt to call the officers at home. When she was not successful, he had her call the Burnsville Police Department and have an officer attempt to make contact with the officers at their home. This too was unsuccessful. (Ex. 4, 23.)

31. At about 12:30 p.m., Inspector Jones received a phone call from Assistant County Attorney Steve Redding who was upset and informed him that the officers had been subpoenaed to testify in a serious rape case, but had not appeared that morning. He wanted them contacted and sent to his office immediately and if they were not at his office before 1600 hours, he would notify the Chief's office of the problem. (Ex. 4, 23.)

32. Based upon his discussions with the County Attorney's office, discussions with the Chief's office and discussions with Fourth Precinct supervisors of Katherine Smulski and Donald Smulski and a review of the officers' personnel files which showed a previous problem with court appearances, Inspector Jones, ordered that the officers be separated as partners. On October 19, 1989, he also initiated an Internal Affairs Division investigation into the allegations. He made these decisions without speaking to Katherine Smulski or Donald Smulski. (Ex. 4, 23; Jones, V. 23, 3878, 3894.)

33. When Inspector Jones told Katherine and Donald Smulski that the order to split them as partners was motivated by their failure to observe a subpoena for October 17, 1989, they requested that he review the station subpoena log. (K. Smulski, V. 1, 132.) That log indicates that neither officer received a subpoena from the County Attorney's office for the October 17, 1989 court date. (Ex. 4, 50-51.) Inspector Jones declined to review these records. He did, however, ask Donald and Katherine Smulski to confirm if they were living together. (Ex. 30, 8.)

34. The result of the alleged refusal to testify and the missed court date led to the commencement by Inspector Jones of IAD investigation # 89-228. The investigation concluded that the claims that the officers ignored a subpoena on October 17 and that the officers failed to stand by for notice to proceed to court on October 13 were untrue. The IAD investigation found that the County Attorney's office failed to issue a subpoena to either officer for October 17, 1989 and that Katherine and Donald Smulski were not

on standby status when the County Attorney's office tried to contact them on October 13, 1989. (Ex. 4.) These facts resulted in a finding of "NOT SUSTAINED" to the alleged violations of subpoena and standby procedures.

35. However, the investigation also concluded that Katherine and Donald Smulski used poor judgment and should have been more cooperative with the County Attorney's office.

36. As a result, on December 26, 1989 Donald Smulski and Katherine Smulski received letters notifying them that the charges against them of violations of Use of Discretion and of the Professional Code of Conduct were “SUSTAINED.” Because the officers had other court appearance problems previously, a one-day suspension was imposed. (Ex. 4, 9-10.)

37. Donald Smulski and Katherine Smulski both filed grievances in the above-matter on January 29, 1990. (Ex. 4, 7-8.) A negotiated settlement was reached on September 18, 1990 in which Chief of Police John Laux altered his ruling and stayed the one-day suspension until December 26, 1990. (Ex. 4, 5, Laux, V.18, 3180.) Donald Smulski and Katherine Smulski never served the one-day suspension.

38. Katherine and Donald Smulski's communications problems with the County Attorney's Office brought to the attention of the Chief's Office and Inspector Jones that the officers were in a romantic relationship and were living together. The Chief's Office knew about the communications problems the officers were having with the County Attorney's Office no later than the afternoon of October 17, 1989, when either Assistant County Attorney Steve Redding or Inspector Jones contacted the Chief's Office.

39. According to Inspector Jones, it was the Chief's Office that directly ordered that Katherine Smulski and Donald Smulski appear at Attorney Steve Redding's office on the morning of October 18, 1989. (Ex. 4, 23.)

40. In October 1989, Chief John Laux had the following view or policy regarding officers having personal relationships outside of the office: Officers in a personal relationship and living together should not be partners or work together; they should be separated and not allowed to work together. (Laux, V. 18, 3212-13.)

E. Lt. Winslow’s “New Approach” to Squad District Assignment.

41. Before the implementation of Inspector Jones' order to split up Katherine and Donald Smulski, they had independently decided to separate as partners. They made this decision in response to a “new approach” to Squad assignments introduced by Lt. Winslow. (Jones, V. 23, 3878-95.)

42. Initially, upon their return to the Fourth Precinct C Shift in early October 1989, Donald Smulski and Katherine Smulski were assigned together as partners on Squad District 450, a permanent two-person Squad. (Ex. 1, 1.) The Monthly Assignment and Scheduling Sheet for October 1989 indicates twelve Squad assignments for that month. Eight of the twelve Squads, including Squad 450, had two officers assigned; two Squads (440 and 441) had three officers assigned; and one

Squad (410) had four officers assigned. The one remaining Squad (431) was an "Able Squad". An "Able Squad" is a Squad with only one officer assigned to it.

43. Squad assignments and rankings within each Squad, in terms of who was listed as the first, second or third officers, were determined by Lt. Winslow on the Monthly Assignment Sheet. (Raiche, V. 2, 306:21, 308:9, 309:17, 310:14, 311:25.) The Sergeants used the Monthly Assignment Sheet to fill out the Sergeant's Daily Worksheet. The Sergeant's Daily Worksheet established the actual Squad assignment of each officer who reported for work that day. (Raiche, V. 2, 218, 225; Violette, V. 33, 5658; Compare Exhibit 1, Monthly Scheduling and Assignment Sheet, to Exhibit 11, Sergeant's Daily Worksheets for 1990.)

44. It was understood that officers in the number one and two positions on each Squad would normally work that Squad every day that they came to work. (Raiche, V. 2, 347; K. Smulski; V. 1, 158-59.) If the officer in the number three position was also present on that day, that officer would be available to fill in on other Squads or the desk as needed. (Raiche, V. 2, 347.) Because the third officer on a car never knew where he or she would work on any given day and could be assigned anywhere on the Sergeant's Daily Worksheet, the third position was referred to as the "tramp." (K. Smulski, V. 1, 56.)

45. Car positions normally followed the order of departmental seniority. (Compare Ex. 1, Monthly Scheduling and Assignment Sheet, with Ex. 3, Seniority List.) This is consistent with the practice of having officers in the same Squad take turns selecting days off in order of seniority, and with the practice of designating the number-one car position as the "car captain," which meant that person would be in charge of a crime scene until a more senior officer arrived. (Ex. 28, 2.)

46. On, or about October 16, 1989, Lt. Winslow and Sgt. Violette informed Donald and Katherine Smulski that the Fourth Precinct C Shift was introducing a new approach or policy for assigning Squads. (K. Smulski, V. 1, 78, 81; Winslow, V. 27, 4644-4657.) Donald Smulski and Katherine Smulski were told that under the new system, three officers would be assigned to each primary Squad and that two of the three officers on each Squad would be required to work their Squad every day. (K. Smulski, V. 1, 82.)

47. Under Lt. Winslow's new approach, officers were to be given their pick of Squads in order of departmental seniority, starting with the most senior officer. (Diaz, V. 29, 4989.) Partners for the desired Squads were to be arranged between the officers themselves (Winslow, V. 27, 4654-56); this was consistent with the MPD's de facto policy of allowing officers to choose their own partners. Sgt. Larson testified that supervisors tried to accommodate officers who wanted to partner together, and that he had never heard of an instance where two officers who requested to partner with each other were denied the request. (Larson, V. 21, 3557-3559.) According to Lt. Winslow, The Fourth Precinct C Shift officers would be allowed to pick their own Squads and partners, with selection occurring in order of departmental seniority. (Winslow, V. 27, 4654-56.)

48. This "new approach" to Squad assignments effectively precluded officers in a relationship from partnering with each other, as they would supposedly never be allowed to take the same days off. In a meeting with Lt. Winslow on or about October 16, 1989, Donald and Katherine Smulski were told that the effect of the new policy was that they could no longer take the same days off work if they stayed together as partners on a Squad. (K. Smulski, V. 1, 82.)

49. Donald and Katherine Smulski considered how they would deal with the new policy in light of their desire to be off work at the same time and their desire to be partners. They decided to separate as partners in order to be able to take off the same days. (K. Smulski, V. 1, 89.)

50. Because Donald and Katherine Smulski knew how much departmental seniority each of their co-workers had and who different officers were likely to pick for Squad partners, they were able to calculate in what order they would pick and which officers would still be available to select as Squad partners when the time arrived for their picks. They informed Lt. Winslow of the Squads with which they wanted to work and the partners with whom they wanted to work. (K. Smulski, V. 1, 90.) The request was not granted at that time because officers with higher seniority had not yet made their picks. (K. Smulski, V. 1, 90-91.) Donald and Katherine Smulski took two days off work as previously scheduled on the Monthly Assignment Sheet for October 1989. (Ex. 1.)

51. When Donald and Katherine Smulski returned from their two days off they found that the new Squad and partner picks had already been done and that the Monthly Assignment Sheet for November was already posted. Their requests for Squads and partners were ignored. Katherine and Donald Smulski's partnership was terminated, they were separated and assigned to Able Squads. (K. Smulski, V. 1, 91.)

52. A comparison of the November Monthly Assignment Sheet, Ex. 1, 2, and the Seniority List, Ex. 3, indicates that officers were allowed to select a Squad and partners according to their seniority.[6] Katherine Smulski and Donald Smulski were eighth and ninth on the seniority list, respectively. (Ex. 3.) When it was their turn to select their Squads and partners, there were still several Squad cars to choose from. However, they were bypassed. The next selection was made by Officer D. Harris, who was tenth in seniority. Unlike their coworkers, Katherine and Donald Smulski were not allowed to select their Squads and partners.

53. While all other officers' assignments became effective on November 1, 1989, Donald Smulski's and Katherine's assignments were made effective immediately. (K. Smulski, V. 1, 95-97.)

54. The reasons for and purpose of the new approach was identified as follows: a) to support officer safety by reducing the use of one-person Able Squads, b) to ensure that two officers would always be available to work primary Squads and c) to facilitate assigned partners working together on a more regular basis. (K. Smulski, V. 1, 82; Diaz, V. 29, 4988-89; 4992; Winslow, V. 27, 4650-51.) These reasons or purposes were not accomplished as a result of the "new approach".

55. More officers worked in Able Squads after the new approach was implemented. The Monthly Assignment Sheets (Ex. 1) for the months immediately following the introduction of the new C Shift policy show not only continued use of Able cars, but a greater use of Able cars than before the new policy went into effect. The Monthly Assignment Sheet for October 1989, the last month before the new policy went into effect, shows only one officer assigned by herself to an Able car (Officer J. Nelson in Squad 431.) The Monthly Assignment Sheet for November 1989, the first month during which the new policy was supposedly in effect, shows four officers assigned by themselves to Able cars. In addition to Officer J. Nelson on Squad 431, Officer Weitzel was assigned as the lone officer on Squad 411, Katherine Smulski (Berg) as the lone officer on Squad 421, and Donald Smulski as the lone officer on Squad 451. (Ex. 1, 2.) The Monthly Assignment Sheets for December 1989 and January 1990 show two officers assigned alone to Able Squads (Ex. 1, 3-4); and the Monthly Assignment Sheet for February 1990 has three officers assigned to Able Squads, including Katherine Smulski (Berg) on Squad 451.

56. The other proffered rationale for the new policy -- to ensure that two of the three officers assigned to the same permanent Squad were always present to work the assigned Squad--also was never put into practice. Sgt. Diaz provided a hypothetical example of how the new system was supposed to work in Exhibit 124. (Diaz, V. 32, 5578-87.) That exhibit, and Sgt. Diaz's testimony, indicate that under Lt. Winslow's new policy, only one of the three officers could be off on any given day. (Id.) In fact, no such practice was ever put into effect. The Monthly Assignment Sheets for November 1989 and subsequent months show that two or more officers working the same three-person permanent Squads were frequently granted the same scheduled days off. (Ex. 1.)[7]

57. In meetings on October 17 and 20, 1989, Katherine and Donald Smulski complained to Lt. Winslow that they had not been allowed to pick their Squads and partners. (K. Smulski, V. 1, 118.) Winslow responded by declaring that he was acting on the instructions of Inspector Jones, who wanted them separated (K. Smulski, V. 1, 118-19.) Lt. Winslow added that Donald Smulski and Katherine Smulski had barely escaped being transferred to separate Precincts, implying that this was Inspector Jones' preference. (Id.)

58. Donald and Katherine Smulski believed that they were being separated as partners because of their personal relationship. They believed that their personal relationship had no effect on their day-to-day activities as police officers. They believed that it was unfair to separate them as partners, particularly because of their excellent record as police officers and because other officers working as partners caused more problems but were allowed to continue as partners.

59. Two officers that caused problems for the MPD were Officers Stoddard and Doran. They were described as having a "John Wayne" syndrome and were referred to as the "Wild, Wild West". Their attitude was such that they jeopardized their lives and the lives of other people. (Winslow, V. 28, 4861-62.) They continued to be partners on the Fourth Precinct C Shift despite the problems they caused.

60. Katherine and Donald Smulski could have been separated as partners without being deprived of an opportunity to select Squads and partners. Katherine and Donald Smulski asked Lt. Winslow for the reasons that they were not given the opportunity to exercise their seniority picks like others. Lt. Winslow refused to give them answers or a reason why he had made the assignments. He initially said, "Because I said so."

61. Lt. Winslow became agitated and angry as Katherine and Donald Smulski attempted to pursue the reasons for their separation as partners and their Squad assignments. He became so angry that Katherine and Donald Smulski had to use Sgts. Diaz and Violette as go-betweens, asking reasons why they were being treated in this manner. (Ex. 28, 2.)

62. Katherine Smulski and Donald Smulski met with Lt. Winslow and Sgt. Violette on October 17 and again on October 20, 1989. After not getting answers to their questions, as to why they were not allowed to use their seniority to make selections of Squads and partners, they surreptitiously recorded a conversation with Sgt. Violette and Sgt. Diaz that occurred on October 22, 1989. They also recorded a conversation with Inspector Jones that occurred in early November, 1989. (Ex. 2.)

63. During a taped conversation on October 22, 1989 between the Smulskis, Sgt. Diaz and Sgt. Violette, Sgt. Violette stated that the reason that Insp. Jones decided to spit them as partners was that he was concerned that the Smulskis' personal relationship would affect other Squad members and that the Smulskis' would play "bumper cars." (Ex. 28, 2.) Sgt. Violette also added that the reasoning behind the decision to split them up was that "[the Inspector] was sure in his own mind that down the line . . . because of your seniority, that you would say Kathy and I have got this night off coming up this Friday, and by God I don't give a shit what you number 2 and number 3 will do." (Ex 28, 4-5.) This alludes to the practice of allowing the number-one officer on Squad the first choice of days off.[8]

64. When Donald and Katherine Smulski met with Inspector Jones, he told them that he had split them because they ignored subpoenas, had missed a court date and, when he was looking into the matter, he discovered that they had a history of court problems. (Ex. 30, 8; Jones, V. 23, 3878-90.)

65. It was at this meeting with Insp. Jones that they explained that ending their partnership was unfair, that they were being unjustly accused, referring to the communications problems with the County Attorney's Office; that they had not missed a court date and had not received a subpoena (offering Insp. Jones the subpoena log); and that they had one of the best records as partners in the Fourth Precinct. (Ex. 30, 1-9.) Regardless of the merit of these entreaties, Insp. Jones indicated that the IAD investigation into the matter would proceed. Insp. Jones seemed to be as much concerned about whether Katherine and Donald Smulski were living together as with the alleged court problems. He stated as follows:

> Well, I think the best I can tell you is there is a problem with the court system (inaudible) have to wait with the IAD issues to

> find out who's at fault. Consider yourselves split up until maybe (inaudible). You two are living together, aren't you?

(Ex. 30, 8.)

Aftermath of Partnership Termination

66. After the decision to terminate their partnership, Katherine and Donald Smulski were on Able cars or were "tramped" from assignment to assignment on the C shift. They held this employment status from the beginning of November 1989 and through approximately November 1990.

67. The Monthly Assignment Sheets indicate Katherine Smulski was assigned either to Able Squads, to the relief Squad, or was listed third in a regular Squad for nine of the fourteen months following being split as Donald Smulski's Squad partner. (Ex. 1.) Since "tramps" often fill in on primary, three-officer Squads only when just one of the three officers assigned to that Squad show up for work, they don't tend to work in one place over any extended period of time.

68. An analysis of the Sergeant's Daily Worksheets, which record the actual Squad assignments of each officer for every day in 1990, indicates that Katherine Smulski was "tramped" around the Precinct, with no permanent Squad assignment during 1990. She was "tramped" more often than other officers. (Ex. 11.) Less senior male officers in the Fourth Precinct during 1990 were assigned to permanent Squads more often than Katherine Smulski.

69. Donald Smulski received adverse assignments similar to those of Katherine Smulski after Inspector Jones' order to separate him and Katherine Smulski went into effect, starting with a more than month-long stint on Able Squad 451 in November 1989. (See Ex. 1, Monthly Assignment Sheet for November 1989.) Like Katherine Smulski, Donald Smulski was subsequently assigned to a three-person Squad in December 1990 (Squad 440, with Officers Ketzner and Vreeland), but in the "tramp" (or number 3) position. Donald Smulski remained in the number 3 position on Squad 440 until March 1990, when he was transferred to the number 3 position on Squad 441.

70. Donald Smulski's "tramp" assignments are similar to those given to Katherine Smulski during the entire year of 1990. And the effect was similar. Donald Smulski's Squad and partner assignments were extremely unstable. By the end of the year, Donald Smulski had worked with 28 different officers. (Appendix B, summary from Sergeant Daily Worksheets, showing number of officers with whom Donald and Katherine Smulski were partnered in 1990.)

71. Finally, after about one year, Katherine Smulski reached an emotional and psychological breaking point. She would become physically ill prior to coming into work. (K. Smulski, V. 3, 533.) November 4, 1990 was the last day that Katherine Smulski worked at the Fourth Precinct. She took sick leave or medical leave due to stress for most of the remainder of November. On or about November 26, 1990, she

transferred to the Second Precinct. (Ex. 7.) A few months later Donald Smulski transferred to the Third Precinct.

COUNT II: Reprisal and Marital Status and Sex Discrimination

A. Inspector Jones' Threat to Make Their Lives Miserable

72. In November 1989, a few days after the meeting with Inspector Jones, Donald Smulski went to see Chief John Laux . He told Chief Laux that he believed that he and Katherine Smulski were being unfairly discriminated against in their assignments because of their relationship. (K. Smulski, V. 1, 146; D. Smulski, V. 4, 778-80.) Chief Laux responded to Donald Smulski's concern by informing Inspector Jones of the meeting (because he thought Officer Smulski had not followed the chain of command) and by directing Inspector Jones to "resolve" the issue. (Laux, V. 18, 3166-67.) Chief Laux gave no further guidance to Inspector Jones. (Id.)

73. A day or two after Donald Smulski met with Chief Laux, while Donald and Katherine Smulski were on patrol, they received messages over the radio to come into the precinct station and see Inspector Jones. (K. Smulski, V. 1, 147; D. Smulski, V. 4, 781-83.) When they went into Inspector Jones' office, he told them to shut the door, shook his finger at them, and said, "If I get one more complaint about you, or you make any more complaints, I'll make your lives miserable. Dismissed." (Id.)

74. In November 1989, the same month that Donald Smulski complained to Chief Laux of unfair treatment and Inspector Jones threatened to make the Smulskis' lives miserable if they ever complained again, Inspector Jones made a rare appearance[9] at a C Shift roll call. (Ex. 107, 7.) Jones appeared at a C Shift roll call at which both Donald and Katherine Smulski were present. At that time he directed Sgt. Diaz's attention to their facial demeanors as an indicator of their "bad attitudes." (Ex. 107, 7.) That observation became the subject of one of a series of entries and memos regarding Donald and Katherine Smulski made in the Sergeant's Notebook by Sgt. Diaz and Sgt. Violette, the Smulski's immediate supervisors at the time. (Id.)

75. The close coincidence in time between Katherine and Donald Smulski's complaints of unfair treatment and Inspector Jones' visit to a roll call attended by both of them, and Inspector Jones' prompting of Sgt. Diaz to note the Smulski's "negative attitude" support an inference of unlawful retaliatory motive by Inspector Jones.

76. Inspector Jones' threat effectively silenced Donald and Katherine Smulski and inhibited them from complaining of discriminatory treatment to anyone in the MPD. The threat "cut us off from ever trying to resolve this matter or ever being able to go to him or anyone else". (K. Smulski, V. I, 148.) Katherine Smulski was also concerned about how her supervisors would perceive her in the future. She worried that she was being made to look like "somebody who complains or whines about things, as those were terms thrown around quite a bit on the shift, especially towards women." (K. Smulski, V. I, 149.) Just a few months later Katherine Smulski's former Power Shift

supervisors described her as a "whiner" to Investigator Wareham of the Burnsville Police Department during a background investigation related to Katherine Smulski's application for a job with the Burnsville Police Department. (Ex. 16.) This matter is discussed in greater detail in subsequent findings.

B. After Katherine and Donald Smulski Complained, They Were Placed in a "Penalty Box"

77. From late October 1989 to November 1990, Donald and Katherine Smulski were assigned to Able Squads and were "tramped" around the department (sent around different Squads on the shift as a "substitute" or "relief" officer). (Ex. 1; Ex. 2.) They did not know from day to day where they would be working or who they would be working with, a situation vastly different from their co-workers, who had all secured their Squad assignments and partners in the October selection process.

78. While some officers preferred to work Able Squads, most officers, including Donald and Katherine Smulski, considered them to be less desirable for at least the following reasons: a) officers worked alone, and b) Able cars were seldom asked to respond to high-priority, in-progress calls, except in the limited role of back-up. (D. Smulski, V. 4, 736-37.) As a result, unlike Squads with two officers, officers placed on Able Squads were often not in a position to make arrests and achieve high daily activity scores. Therefore, officers on Able Squads were at a significant disadvantage when their daily performance was assessed and ultimately their annual performance evaluation was conducted. See Findings 116, 117, 118 and Ex. 106.

79. Every month, beginning in October 1989 through November 1990, Lieutenant Winslow essentially put Donald and Katherine Smulski in a "penalty box" when he made out the monthly assignment[10]. Every month Lieutenant Winslow chose not to reverse his decision and continued to assign them to Able cars or to relief as "tramps".

C. Administrative Tools Used for Reprisal

80. Sgt. Donald Banham's first assignment after his promotion to Sergeant was the Fourth Precinct C Shift in July 1990. At that time, the other C Shift supervisors were Lt. Winslow and two other Sergeants, Diaz and Raiche. Shortly after Sgt. Banham came on the C Shift as a Sergeant Supervisor, he had a discussion with Sgt. Diaz. When Sgt. Diaz was explaining to him performance evaluation forms and the evaluation process, Sgt. Diaz told him that C Shift supervisors used documentation and performance evaluations to get rid of women officers that the supervisors were having a problem with. Sgt. Banham stated as follows:

> We were going over some evaluation forms, and Sgt. Diaz was showing me the current evaluation form and the process and the was talking about the shift in general and had made a statement that there was -- I can't remember the exact number, but there were

> "x" amount of women on the shift and that there were problems with some of the women that they had on the shift and they were able to get rid of them by -- through evaluation and documentation.

(Banham, V. 9, 1613.)

81. Sgt. Diaz also told Sgt. Banham that Inspector Jones had been informed of the practice by Fourth Precinct supervisors. The practice -- using documentation and evaluations to get rid of women officers causing problems -- was being done with Inspector Jones' "consideration and his knowledge". (Banham, V. 9, 1614-15.)

82. The Fourth Precinct supervisors used the “Sergeant’s Notebook” and performance evaluations as administrative tools to take reprisal against Donald and Katherine Smulski and to discriminate against them because of their marital status. The Fourth Precinct supervisors also used the “Sergeant’s Notebook” and performance evaluations as administrative tools to take reprisal against Katherine Smulski and other female officers and to discriminate against them because of their gender.

D. The Sergeant's Notebook

83. Sergeants on the Fourth Precinct C Shift maintained a notebook of memos and notes documenting mostly minor infractions or misconduct by officers under their supervision. Exhibit 107 is a portion of the memos and notes recorded by the Sergeants.[11] C Shift patrol officers were not informed when a Sergeant’s Notebook entry was made relating to them. Although the entries were kept in alphabetical order, entries regarding two or more officers often appear on a single page. The entries were usually handwritten and signed by the sergeant making the entry. (Ex. 107.)

84. Some entries include statements to the effect that the officer who was the subject of the entry had been verbally counseled about the specific incident with which the entry dealt. In other cases, there is no indication that the officer was counseled. None of the entries is signed by the officer who is the subject of the entry. There is no indication in any of the entries that the subject officer was advised that any written record was being made. (Ex. 107.)

85. The notebook entries regarding both Donald and Katherine Smulski mostly deal with seemingly innocuous comments on the part of Donald Smulski, and in the case of Katherine Smulski, often nothing more than an ambiguously "negative" demeanor. Typical is the entry by Sgt. Diaz, dated 11-89, that was prompted by Inspector Jones. (Ex. 6, 5.) That entry documents Donald Smulski's statement, "Oh, this is great," after receiving a days off list, and the fact that Katherine Smulski "appeared to be equally upset." On the same page is another entry by Sgt. Diaz with the same vague "11-89" date. (Id.) In this entry, Donald is written up for the remark, "darn it, no luck" when viewing a transfer sheet. (Id.) In an entry signed by Sgt. Violette and dated 1-2-90, Donald Smulski is written up for making a non-verbal gesture in

response to another officer making a joke at roll call about the fact that Donald Smulski was ordered by the MPD to undergo a psychological evaluation. (Ex. 6, 7.)

86. Sergeant's Notebook entries similar to those made about the Smulskis were made about other officers who complained of unlawful gender discrimination. Entries regarding Mary Ketzner began appearing in March 1989, the same month that she went to Chief Laux to complain of gender discrimination on the Fourth Precinct C Shift. (Ketzner, V. 6, 1065, 1082.) Among the first entries regarding Officer Ketzner is an entry by Sgt. Diaz dated 3-30-89, documenting the fact that Officer Ketzner had gone to the Chief's office on that day. (Ex. 39.) Ketzner stated that "Every single thing written in [the Sergeant's Notebook about me] was written after I started making complaints about the way women were treated." (Ketzner, V. 6, 1073.)

87. Officer Alisa Clemons was also the subject of negative entries in the Sergeant's Notebook. (Ex. 47.) Entries regarding her began in early March 1989, after she and Mary Ketzner challenged an accusation by Sgt. Violette that Clemons had made a sarcastic remark on a radio during a Crack Team drug bust.[12] (Clemons, V. 6, 1141.) Ketzner informed Sgt. Violette that she, rather than Clemons, had made the comment. (Id.; Ketzner, V. 6, 1093; 1095). Sgt. Violette responded to this information by making an entry in the Sergeant's Notebook in which he states that Ketzner and Clemons confessed to him that they had both made the sarcastic comment. (Ex. 47.) Both Clemons and Ketzner deny that any such confession was ever made by them. (Clemons, V. 6, 1151, 1153; Ketzner, V. 6, 1093-95.)

88. Shortly after this incident, Sgt. Violette informed Officer Clemons that she was kicked off the Crack Team. (Ketzner, V. 6, 1093.) The other female officers on the Crack Team objected to this action as unfair, and a meeting was held in the Narcotics Unit between several of the female officers, Sgt. Violette, Sgt. Thomas, Sgt. Murphy, and Lt. Fisher. (Clemons, V. 6, 1157; Ketzner, 1095.) At this meeting, Sgt. Violette accused Officer Clemons of warning the suspects in the drug bust of the impending raid. (Clemons, V. 6, 1159; Ketzner, V. 6, 1095.) The accusation was denied by Officer Clemons (Clemons, V. 6, 1160.)

89. Officers Clemons, Ketzner and Ann Quinn-Robinson complained of Sgt. Violette's actions to Chief Laux on March 30, 1989. (Clemons, V. 6, 1161; Ketzner, V. 6, 1082; Ex. 39.) Clemons asked for a formal investigation to clear her name, but nothing was ever done. (Clemons, V. 6, 1160-61.) After this point in time, a large number of negative entries regarding Clemons appear in the Sergeant's Notebook, most of them detailing trivial incidents. In one entry, Clemons is written up for having to retrieve her "red card" from her station locker for an inspection, even though some officers did not carry the cards with them at all. (Clemons, V.6, 1153-54.) Many of these entries, including Sgt. Violette's fabricated entry stating that Clemons confessed to making a sarcastic comment on the radio, were later used to document adverse IAD findings against Clemons. (Compare "findings" in Ex. 53, with Sergeant's Notebook entries regarding Officer Clemons, Ex. 47.)

90. Sergeant's Notebook entries were used as documentary proof of violations in Internal Affairs Division ("IAD") complaints that were initiated against Donald Smulski and Katherine Smulski and other female officers who complained about unfair discrimination in the conditions of employment on the C Shift. Sergeant's Notebook entries were used as documentary proof in at least two IAD investigations. The first was Katherine and Donald Smulski's complaint IAD No. 90-163 relating to sex and marital status discrimination by Fourth Precinct supervisors. Sgt. Olson reviewed the Sergeant's Notebook "documentation" provided by Fourth Precinct supervisors and determined that there was no basis for pursuing the sex and marital status discrimination complaint. (Sgt. Olson's summary contained in Exhibit 63.)

91. The second IAD investigation where the Sergeant's Notebook documentation was used as proof in an IAD investigation is IAD Case No. 89-193 brought against Sgt. Clemons. (Ex. 53.) Findings made by the investigator in this case are virtually verbatim recitations of entries into the Sergeant's Notebook. Compare Exhibit 47 and Exhibit 53. Several of the findings in Exhibit 53 are preceded by the dates contained in the Sergeant's Notebook entries relating to Sgt. Clemons.

92. The MPD had no policy regarding Sergeant's Notebooks. (Jones, V. 22, 3735, 4043; Winslow, V. 27, 4576, 4824-25.) While Inspector Jones stated that they were common in the MPD, the City presented no supervisor from any other precinct or shift who testified that they maintained a similar notebook. Rather, at least one MPD supervisor, Lt. Wurster, indicated that such records were a bad practice. (Wurster, V. 14, 2524.)

93. The existence of the Sergeant's Notebook was not revealed to the officers who were the subjects of the entries. Clemons did not know of its existence until after entries were used as documentary proof of past conduct in an IAD disciplinary proceeding against her. (Clemons, V. 6, 1148.) Ketzner was not aware of the Sergeant's Notebook existence until 1990, when she filed a charge of discrimination against the MPD with the Department of Human Rights. The Sergeant's Notebook entries relating to Mary Ketzner were revealed in a response to a request for copies of all documents pertaining to her. (Ketzner, V. 6, 1064.) Katherine Smulski did not know of the notebook's existence until Ketzner told her about it around March of 1990. (K. Smulski, V. 36, 6005-06.) There is no indication in the record that Donald Smulski knew of its existence prior to Katherine Smulski's knowing of it.

94. The sergeants who made entries into the Sergeant's Notebook maintained at trial that the Sergeant's Notebook was used only to refresh memories during performance evaluations, and that the entries themselves did not constitute discipline. Sgt. Violette categorically declared: "There is no relationship between the concept of progressive discipline and my entries in the Sergeant's Notebook." (Violette, V. 33, 5657.) However, as indicated in Finding 91, the IAD investigation that resulted in the discipline of Officer Clemons contains nearly verbatim references to his Sergeant's Notebook entries.

95. The sergeants who made entries into the Sergeant's Notebook also maintained at trial that the Sergeant's Notebook was open to any officer who wanted to review the entries relating to him or her. Sgt. Diaz stated that any officer could come into the Sergeant's office at any time and review entries in the Sergeant's Notebook pertaining to them. (Diaz V. 32, 5558-59; 5610-11.) As discussed in paragraph 93, Clemons, Ketzner and Katherine and Donald Smulski did not know that a Sergeant's Notebook existed. This greatly limited the likelihood that one of these officers would come to the Sergeant's office to request to review entries pertaining to them. After Katherine Smulski learned of the existence of the Sergeant's Notebook, she and Donald Smulski asked Sgt. Diaz if they could see the entries pertaining to them. Sgt. Diaz refused, stating that they would have to get permission from Lt. Winslow, who was not present that day. (K. Smulski, V. 36, 6008-09.)

E. The Burnsville Police Officer Application

96. In January of 1990, Katherine Smulski applied for a position with the Burnsville Police Department. (K. Smulski, V. 3, 458.) It had always been her goal to work in Minneapolis for a few years to gain experience in a large metropolitan department and then use that experience to find a job on police force in the suburbs. (K. Smulski, V. 3, 458.)

97. The hiring process at the Burnsville Police Department in early 1990 consisted of several steps. (Wareham, V. 5, 841; Rau, V. 5, 907.) First, the Police Department coordinated with the Human Resources Department to advertise, seek applications, and schedule oral interviews. (Rau, V. 5, 907.) Next, the applicants were screened according to certain standards and the successful candidates were scheduled for an oral interview. (Id.) At the conclusion of the oral interviews a list was generated. (Rau, V. 5, 908.) The top person on that list had to pass psychological and medical tests and a background investigation. (Id.) At the completion of the background investigation the investigator submitted a verbal report followed by a written report to the Patrol Division Commander. (Rau, V. 5, 910.) The Patrol Division Commander would make a recommendation to the Chief of Police as to whether or not the applicant was a worthy candidate. (Rau, V. 5, 911.) The ultimate hiring decision was the Chief's.

98. In early 1990 the Burnsville Police Department was seeking to hire two officers. (K. Smulski, V. 3, 458.) After the application screening and oral interview, Katherine Smulski was the top candidate for one of the positions and Burnsville officer Dennis Wareham was appointed to conduct her background investigation. (Wareham, V. 5, 841, 849.) Officer Wareham is an experienced background investigator; he has performed 15-20 background investigations for the Burnsville Police Department. (Wareham, V. 5, 840.) As part of the background investigation Officer Wareham spoke to several of Katherine Smulski's supervisors at the Minneapolis Police Department including Lt. Winslow, Sgt. Dallman, and Sgt. Larson. (Wareham, V. 5, 852.)

99. Lt. Winslow volunteered information to Officer Wareham regarding communication problems that Katherine and Donald Smulski had. He told Officer

Wareham that IAD Complaint No. 89-228 was filed in connection with the matter. He told Officer Wareham that the Internal Affairs investigation determined that they had been "verbally abusive" to the County Attorney's office staff and "missed a required court appearance". (Ex. 16, 6.) He told Officer Wareham that as a result of the IAD investigation, Katherine and Donald Smulski received a one-day suspension and were separated as partners. (Id.) Winslow volunteered that Katherine Smulski believed that the separation was unfair and had accused him of "picking on her." (Id.) Sgts. Larson and Dallman also volunteered information about the IAD investigation.

100. Sgt. Larson, who had supervised Katherine Smulski while she was on the Power shift at the Fourth Precinct, was interviewed by Officer Wareham on February 14, 1990. (Ex. 16, 7.) Sgt. Larson "characterized Katherine as one of the better female officers on the department." (Ex.16, 7.) He further stated that "Berg does not seem to have a 'chip on her shoulder' or be out to prove anything as a female officer." (Ex. 16, 7.) Sgt. Larson questioned Katherine Smulski's "moxie" regarding police sense and tactics. (Ex. 16, 7.) During his interview, Sgt. Dallman said that Katherine Smulski "was 'absolutely the best female officer' he has worked with." (Ex. 16, 7.) Regarding the statement that Katherine Smulski was "absolutely the best female officer," Dallman admitted at trial that he had made the statement and explained: "In my opinion, she was not the best officer I had on my shift but, comparing her to the entire shift, she was the best female officer on the shift." (Dallman, V. 16, 2805-06.) Dallman also seconded Larson's contention that Katherine Smulski "may not have the 'police moxie' that others may have." (Ex. 16, 8.)

101. Lt. Winslow reported to Wareham that Katherine Smulski had accused him of "picking on her" after she and Donald Smulski were ordered to be split up as partners. (Ex.16, 6.) Sgt. Larson is credited with saying that Katherine Smulski "tends to complain a lot if she feels mistreated." (Ex. 16, 7.) Sgt. Dallman stated that Katherine Smulski was "starting to become a whiner." (Ex. 16, 8.) Officer Wareham testified that these comments suggested to him that Katherine Smulski may have behavioral problems as a police officer. (Wareham, V. 5, 895-96.)

102. While Katherine Smulski authorized the release of private data pertaining to her, only authorized personnel have access to that information and may properly dispose of it under Section 2-107 of the MPD Policy and Procedures Manual. (Ex. 13, 57.) The information released by the supervisors was incomplete and inaccurate. Not one of them mentioned that Donald and Katherine Smulski had grieved the complaint. In addition, Lt. Winslow's statement that Donald and Katherine Smulski "apparently missed a required court appearance" is also inaccurate. (Ex. 16, 6.) According to the findings in IAD No. 89-228, missing a required court appearances not one of the claimed violations. The charge of a violation of Standby Court Time was "Not Sustained". (Ex. 4, 1.)

103. While Officer Wareham conducted the background investigation of Katherine Smulski, Fourth Precinct supervisors volunteered negative comments about Donald Smulski. (Ex. 16.) Donald Smulski had not authorized the release of

information relating to him. (Ex. 16A.) And yet all three interviewed MPD supervisors offered information about Donald Smulski. (Ex. 16.)

104. Lt. Winslow stated that he felt that 90 percent of the incidents leading up to the IAD investigation were initiated by Donald Smulski. (Ex. 16, 6.) Winslow further stated that either Donald Smulski or Katherine Smulski would have to leave the Fourth Precinct but that he would rather keep Katherine Smulski than Donald Smulski. (Ex. 16, 6.) Sgt. Larson stated that he "feels Smulski is a bad influence on Berg" and that he would also rather lose Donald Smulski than Katherine Smulski. (Ex. 16, 7.) Sgt. Dallman also felt that Donald Smulski was a bad influence on Katherine Smulski. (Ex. 16, 8.) Both Sgt. Dallman and Larson also referred to Donald Smulski's role in IAD No. 89-228. (Ex. 16.)

105. Officer Wareham forwarded the information he had gathered at the Minneapolis Police Department to Lt. Fred Rau, the commander of the Burnsville Patrol Division. (Rau, V. 5, 913.) As a result of that information, Lt. Rau recommended to Burnsville Chief DuMoulin that Katherine Smulski not pass the background investigation and that they move on to the next candidate. (Rau, V. 5, 914.)

F. Lt. Winslow's Threats to Take Donald and Katherine Smulski's Badges Away

106. After Katherine Smulski found out she had been denied a position with the Burnsville Police Department, she and Donald Smulski met with Sgt. Diaz and Lt. Winslow in the supervisor's office at the Fourth Precinct. (K. Smulski, V. 3, 478.) The meeting occurred immediately after roll call on a day in early March, 1990 because of a misunderstanding between Donald Smulski and Sgt. Diaz that had occurred at roll call. (D. Smulski, V. 4, 784.)

107. When Donald and Katherine Smulski went into the office for the meeting, Winslow was already irate, and he eventually told them that they "could not fight City Hall and win." (K. Smulski, V. 3, 479; Winslow, V. 27, 4690-91.) Katherine Smulski believed he was referring to rumors that were circulating at the Department that, because she had been denied the Burnsville position, she was planning a lawsuit against the Department and that Winslow was attempting to discourage her from pursuing legal action. (K. Smulski, V. 3, 479-80.)

108. Winslow also threatened that if Donald Smulski and Katherine Smulski didn't change their attitudes, he would build a case against them using small violations to eventually take their badges and get them terminated from the Police Department. (K. Smulski, V. 3, 479; D. Smulski, V. 4, 785.) Katherine, who knew the progressive discipline system could be abused in such a way by supervisors, took his threat seriously. (K. Smulski, V. 3, 480.)

109. Winslow's comments and threat greatly disturbed both Donald and Katherine Smulski and Katherine Smulski left the room in tears. (K. Smulski, V. 3, 480.) Donald Smulski, who had stayed in the office, was told by the supervisors that he

and Katherine Smulski needed to come up with some way to prove to the supervisors that they were trying to change their attitude. (D. Smulski, V. 3, 786.) Donald Smulski went into the hall and suggested to Katherine Smulski that they volunteer to be Field Training Officers (FTOs), as he couldn't think of anything else to do that would appease the Lieutenant. (K. Smulski, V. 3, 482.) Katherine Smulski agreed and both of them returned to the supervisor's office to volunteer for FTO duty. Lt. Winslow agreed that they could be FTOs and the meeting ended. (Id.)

G. Performance Evaluations

110. In the early spring of 1990, Donald and Katherine received low scores on their 1989 Performance Evaluations. The MPD Performance Evaluation is a single-page document with writing on front and back. On the front side there are 24 specific categories of performance for which officers are evaluated. These 24 categories are roughly divided in six general categories. These categories include:

Section "A" - APPEARANCE
Section "B" - ATTENDANCE AND WORK HOURS
Section "C" - ATTITUDE
Section "D" - RELATIONSHIPS
Section "E" - KNOWLEDGE
Section "F" - PERFORMANCE

See, for example, Exhibit 45. Each of these six general categories is evaluated based on a scale of 1-7.

111. A score of 1-3 falls in the category of "unacceptable" and requires the officer to be re-evaluated within three months for that category. A score of "4" is the minimum "acceptable" score. A score of 5-7 is defined as "superior". (Ex. 5, 84.)

112. On the back of the form is space for comments by supervisors. Supervisors are required to provide comments to justify scores of "7" and unacceptable scores. If an unacceptable score is given in a category, the supervisor must state specific corrective action that the officer must undertake to improve in the category.

113. The scores on the front of the form are totaled to arrive at a "raw score". This raw score is then plugged into a mathematical formula on the back of the form to arrive at a final numerical score. A perfect score (all 7s) yields a final score of 100. A final score under 74 is "unacceptable" and requires a complete re-evaluation of the officer within three months. (See Ex. 69, Performance Evaluation User's Manual, I-1 to I-6, for general instructions on how the form is supposed to be used.)

114. The Performance Evaluation User's Manual ("User's Manual") establishes in Section II specific criteria referred to as "standardized evaluation guidelines" that must be used for scoring. (Ex. 69, I-2; II-1 - II-24.) There is no provision

in the User's Manual for using any other criteria. The use of any other criteria would defeat the purpose of "standardized guidelines."

115. The User's Manual was often ignored by Fourth Precinct supervisors. One of the Smulskis' evaluating officers, Sgt. Jerry Larson, expressed open contempt for the User's Manual and the Performance Evaluation, which he variously described as "the biggest bunch of crap I have ever seen in my life" and as "so subjective that it . . . doesn't mean anything." (Larson, V. 21, 3607.) When asked if he agreed with the standardized scoring criteria outlined in the User's Manual, he replied, "No. My overall opinion of this thing is that it's just lousy. I think it's real subjective." (Larson, V. 21, 3616.) He cited the "Attitude" sections on the form as one of the most objectionably subjective. (Id.) Performance evaluations completed by Sgt. Larson and Sgt. Dallman in 1989 indicate that the User's Manual played little role in the scores they gave.

116. Instead of adhering strictly to the standardized guidelines in the User's Manual, the Fourth Precinct C Shift, as well as the Power Shift, placed great weight on a so-called "Patrol Performance Chart" in scoring performance evaluations. Dallman testified that the Patrol Performance Chart accounted for about 30 percent of an officer's performance evaluation score on the Power Shift. (Dallman, V. 17, 2980.) Sgt. Diaz kept similar "street statistics" for the C Shift, and these statistics played a similar role in performance evaluations on that shift. (Diaz, V. 29, 4979-82; Raiche, V. 2, 288.)

117. The Patrol Performance Chart was used to award and track points for individual officers based upon the number and types of arrests, citations and reports they made while on patrol. (Diaz, V. 29, 4978-80.) More points were awarded for "crime-in-progress" calls than for "report" calls coming after a crime or disturbance had transpired. Report calls generally required only the writing of a report. Felony arrests received the highest number of points -- five, compared to just one point for a traffic stop. (Diaz, V. 29, 4979.)

118. There were some problems with the Patrol Performance Chart. Because only two-officer Squads were generally dispatched to in-progress calls, officers assigned to Able Squads were necessarily handicapped by this system. Able Squads were handicapped by the fact that the officer was working alone. Sgt. Diaz testified that his formula for plotting performance statistics on the Patrol Performance Chart did not take into account the type of Squad to which an officer was assigned. (Diaz, V. 29, 4982.) Another problem with the Patrol Performance Chart was "padding," which occurred when a group of officers inappropriately shared credit for high-credit calls like felony arrests.[13] (Dallman, V. 17, 2957-58.)

119. Performance evaluations were generally completed at the end of each year, usually in January. However, if an officer transferred to a new shift during the course of a calendar year, his old shift was required to complete a performance evaluation for the part of the calendar year already worked within 10 days of the officer's transfer. (Dallman, V. 17, 3020.) Performance evaluation scores impact an officer's

career because cumulative scores and supervisor comments play a role in how officers are ranked on promotion lists. (Laux, V. 20, 3390.)

120. Prior to October 1989, Katherine Smulski's supervisor gave her a score of 91 out of a possible 100 points on each of her last two performance evaluations. (See Ex. 7, 35, K. Smulski's performance evaluation scores for the reporting periods of 8-1-88 through 12-31-88 and 1-1-89 through 5-31-89.) According to the ten-day policy described in Finding 120, her Power Shift supervisors, Sgt. Larson and Sgt. Dallman, should have completed performance evaluations for Katherine and Donald Smulski for the reporting period of 1-1-89 through 9-30-89 sometime during the month of October 1989. October 1989 was the same month that she and Donald Smulski transferred back to the C Shift (and the month that Inspector Jones ordered her C Shift supervisors to split up Katherine and Donald Smulski as partners.)

121. Instead, Sgt. Larson and Sgt. Dallman completed their performance evaluations about four months late in February 1990. (Ex. 7, 55; Ex. 5, 75.) Sgt. Larson and Sgt. Dallman thus violated the ten-day time policy by waiting five months to complete Donald and Katherine Smulski's final performance evaluations for the Power Shift. While the rest of the Power Shift was evaluated by these sergeants in January 1990, the Smulskis' performance evaluations were separated out and held until a month later and were not completed until February 5, 1990. (Id.; Ex. 83.) Dallman's only explanation is that "We must have run out of time." (Dallman, V. 18, 3020.) Katherine Smulski ultimately received a score of "84", significantly lower than her two previous scores of "91" (Ex. 7, 55-56.) Donald Smulski's score went from "91" to "85". (Ex. 5, 75.)

122. Neither Sgt. Dallman nor Sgt. Larson identified any objective decline in Katherine Smulski's performance to warrant the lower score. Indeed, both of her Power Shift supervisors spoke very highly of her police work and attitude. (Larson, V. 19, 3554.) Their generally glowing assessment of her performance on the Power Shift is supported by letters, memos and recommendations for awards for outstanding police performance during this period. (See Ex. 7.) Instead, Sgt. Dallman and Sgt. Larson maintain that the lower score resulted from a unilateral decision on their part to combat inflated performance evaluation scores by using "more accurate judgment". (Dallman, V. 19, 3247-48; Larson, V. 21, 3607.)

123. On her 1989 Power Shift evaluation, Katherine Smulski saw her scores in the "knowledge" section decline from four "5s" and a "6" (all superior scores) in her previous evaluation to three "5s" and two "4s" (three superior, two acceptable scores). (Ex. 7, 55-58.) Scores for three of the five categories in the "Knowledge" section declined for Katherine Smulski, with no specific reasons offered by either Sgt. Larson or Sgt. Dallman to justify this decline apart from their new approach to scoring. But a male officer, identified in Exhibit 83 as "Officer 2", received perfect scores of "7" in all five knowledge sections in 1989 despite the new approach to scoring (Dallman, V. 19, 3251-53); "Officer 3", another male, received straight "6s", unchanged from his 1988 score. (Dallman, V. 19, 3253-55.) Dallman's only explanation is that he and Sgt. Larson must

have concluded that Katherine Smulski's previous scores were inflated, but not the two male officers' previous scores. (Dallman, V. 19, 3255.)

124. Other categories in which Katherine Smulski witnessed declines in her 1989 Power Shift performance evaluation scores to "acceptable" from "superior" included driving skill, investigative skill, and problem solving -- some of the areas that historically had shown the greatest gender disparity in scoring. (Ex. 7, 55-56; Ex. 76.) Overall, her score fell seven points, from "91" in 1988 to "84" in 1989. Donald Smulski's score dropped six points, from "91" to "85". Other male officers survived Larson's and Dallman's campaign against score inflation: Officer 1 (Ex. 83) scored "96", Officer 2 scored "92", Officer 3 scored "90", and Officer 4 scored "89". Officer 7, another male, originally saw his score decline from "90" to "84" in 1989; however, his 1989 score was later adjusted back up to "89".

125. The problematic "subjectivity" to which Sgt. Larson voiced much opposition to during his testimony is perhaps illustrated by the score he and Sgt. Dallman gave to Officer 3 -- a male officer. Officer 3 had five sustained excessive force complaints against him in 1989. According to the User's Manual, that kind of record should have justified a very low or unacceptable score (of "3" or less) on "Attitude towards police work" in Section C, instead he received a perfect score of "7". Similarly, an officer with this record should have gotten "unacceptable" on several other categories; for example, on "Relationships with citizens" in Section D, instead he received a "4"; on "Knowledge of department policies and procedures" in Section E, instead he received a "6"; on "Field performance - stress conditions" instead he received a perfect "7"; and "Control of conflict" in Section F, instead he received a "4".

126. Sgt. Larson explained Officer 3's scores by stating that he was unaware of this officer's problems. (Larson, V. 21, 3622.) He added that the officer later requested a transfer to another precinct because of family troubles. (Larson, V. 21, 3623.) In fact, as his later testimony revealed, Larson was intimately aware of this officer's problems "slam-dunking people," as Sgt. Larson put it, and that it was Larson who suggested to the officer that he transfer in order to save his career. (Larson, V. 21, 3663.)

127. Larson's and Dallman's comments to Investigator Wareham (Ex. 16) of the Burnsville Police Department indicate that they were well aware of the problems Donald and Katherine Smulski were having on the C Shift after they left the Power Shift. Larson's telling comment that "one of them would have to go" further indicates that he knew how the Smulskis' supervisors in the Fourth Precinct wanted the situation to be resolved. At least one of those supervisors, Inspector Jones, was also directly over Larson and Dallman in the chain of command. As commander of the Fourth Precinct, Jones also had to sign these performance evaluations.

128. The performance evaluation that Katherine Smulski received from her C Shift supervisors for the period of October 1989 through December 1989 is signed by Sgt. Diaz, Sgt. Violette and Inspector Jones. The evaluation scores Katherine Smulski

"88", but gives her failing scores in "attitude towards police work," "acceptance of feedback" and "relationships with other department members." (Ex. 7, 53-54.) These failing scores required her evaluating sergeants to provide detailed explanations for the scores on the back of the form, and specific corrective actions to be taken by her supervisors and her. (Ex. 69, 5.) They do so on the back of the evaluation form by noting that Katherine Smulski "has been very 'down'" since being split up from her partner, "appears" unhappy at roll call, and that she made a comment after roll call to the effect that, "I'm going to have my lawyer look into this." (Ex. 7, 54.) Being "down" is entirely irrelevant to scoring this category under the criteria listed in the User's Manual. (Ex. 69, 13.)

129. Her supervisors failed her in "acceptance of feedback" on the basis of a single incident in which she walked out of a supervisor's office. This contrasts with the perfect "7" in "field performance -- stress conditions" received by an officer who had five excessive force complaints against him sustained in the year of his evaluation (Officer 3, 1989 performance evaluation, Ex. 83; supra.) The User's Manual focuses on an officer's response to corrective instruction in the "Acceptance of Feedback" category. The comments on the back of Katherine Smulski's performance evaluation indicate that the discussion she walked out of had nothing to do with corrections in her performance. Instead, her supervisors used that meeting to separate her and Donald Smulski as partners and assign them to Able cars. All three supervisors signing the performance evaluation form were aware that Donald and Katherine Smulski regarded that employment action as unlawful discrimination.

130. The very generalized "corrective action" statements on the back of Katherine Smulski's evaluation provided her with a warning that her supervisors will continue to monitor her attitude, but with no specific instructions on what she could do to improve her attitude other than "improve her attitude." (Ex. 7, 54.)

131. Donald Smulski's performance evaluation for the same period has "unacceptable" scores in the same three areas, plus "general appearance" and "self-initiated field activity." (Ex. 5, 92-93.) Like Katherine Smulski's evaluation, Donald Smulski's failing score in "attitude towards feedback" is justified solely on the grounds of his unhappiness with being split up from his partner and placed on an able Squad, (id.), actions his supervisors knew that he regarded as unlawful discrimination. His supervisors justified a failing grade in "relationships with other department members" on the basis of alleged "problems with the County Attorney's Office on a number of occasions" but those problems have nothing to do with scoring this section under the criteria set forth in the User's Manual. (Ex. 69, 16.)

132. Citing lower statistics after being transferred from a primary two-person Squad to an Able Squad as justification for failing Donald Smulski in "self-initiated field activity" is another departure from the criteria set forth in the User's Manual. A single-officer Able Squad is not going to get the high arrest statistics that officers in two-person Squads get.

133. The 1989 performance evaluation scores given to Donald and Katherine Smulski by their former Power Shift and then-current C Shift supervisors are another instance of reprisal taken against them because they opposed unlawful discrimination. After Katherine and Donald Smulski left the Fourth Precinct, their evaluation scores returned to the low- to mid- 90s. (See Ex. 5 and Ex. 7.)

134. Officer Clemons' performance evaluation for the March 1 - November 30, 1989 reporting period (Ex. 46), signed by Sgt. Violette and Sgt. Diaz, bears the same retaliatory characteristics as the performance evaluations given to the Smulskis -- failing scores in "attitude" (including a "1" in "relationships with other department members"), and "documentation" on the back of the form consisting solely of generalized statements. She is accused of reacting badly to advice, but neither the advice nor the reaction are specified; she is accused of "constantly making small mistakes," but not a single "mistake" is identified. Id.)

135. Officer Mary Ketzner, another female officer who complained of discriminatory treatment, received similar treatment on her performance evaluation. She took her concerns about her 1989 performance evaluation to the Police Officer's Federation. With the help of the Police Officer's Federation, her performance evaluation was reviewed by Chief Laux. (Exs. 40, 41 and 42.) Upon review of Officer Ketzner's performance evaluation, Chief Laux determined that the "unacceptable" scores were not supported by documentation. He returned the performance evaluation to Insp. Jones, stating as follows:

> If in fact the items referred to in the attached document are not supported by documentation, they must be removed from the form. Allegations of substandard performances or misconduct must be documented at the time of occurrence.

(Ex. 42.)

136. Chief Laux gave Inspector Jones, Sgt. Violette and Sgt. Diaz two opportunities to justify their original evaluation by providing further details, but when they failed, Chief Laux adjusted Officer Ketzner's scores himself. (See Exs. 42-45.)

137. The assessment of the performance evaluations of Katherine and Donald Smulski, Mary Ketzner, and Alisa Clemons and the camparison with those of male police officers establishes that supervisors in the Fourth Precinct used performance evaluations as a tool of reprisal against officers who complained about unlawful discrimination. This is consistent with the picture of the C Shift painted by the uncontested testimony of Sgt. Banham that when he was first promoted to sergeant and transferred to the Fourth Precinct C Shift in July, 1990, Sgt. Diaz told him that he and other supervisors on the shift had used "performance evaluation and documentation" to "get rid of" female officers who were giving the supervisors problems. (Banham, V. 9, 1613-15.)

H. Referrals for Psychological Evaluations

138. The MPD referred persons who complained of unlawful discrimination for psychological evaluations. From November 1989 to November 1990, the period which lies at the heart of Donald and Katherine Smulski's complaints against the MPD, both were ordered by the Department to submit to psychological evaluations. (K. Smulski, V. 3, 547, Ex. 34, 1.) Chief Laux, who was ultimately responsible for referring individuals for such evaluations, stated that he made six or so referrals for psychological evaluations every year. (Laux, V. 20, 3437.) No less than four of the referrals given from November of 1989 to November of 1990 were given to officers who worked on the Fourth Precinct C Shift and who had recently complained of discriminatory treatment.

139. Katherine Smulski was referred by Chief Laux, via Pam French of the Personnel Division, to Dr. Loring McAllister in November of 1990. Dr. McAllister's report indicates that in addition to the extreme emotional distress that she was experiencing, she was referred because "she believes she is being harassed and has filed a complaint." (Ex. 10, 1.)

140. Donald Smulski, within a month after voicing complaints about discriminatory treatment, was referred for a psychological evaluation, allegedly because of a mobile dta terminal ("MDT") message that he sent.

141. Officer Alisa Clemons, whose problems at the Fourth Precinct C Shift are more fully discussed below, was ordered to submit to a psychological evaluation in January 1990 after an investigation into her complaints of gender discrimination. (Ex. 55.) This was the second such referral for Clemons; in April of 1989, within a few days of complaining to Chief Laux about discrimination and harassment on the Crack Team, she was required to contact David Franzen, a counselor with the Employee Assistance Program, for an evaluation. (Ex. 51.)

I. Donald Smulski's MDT Message

142. On November 28, 1989 Donald Smulski was assigned to Squad 460. Toward the end of the shift, at approximately 11:40 p.m., Donald sent out the following two messages over the mobile data terminal (MDT) with which each Squad car is equipped:

> Midwatch all month and no choir practice. Must be something in the air. But censorship prohibits stating the real reason. Transfer anyone. And it's little ole cynical, disciplinary problem me.

(Ex. 34, 15.) This message was monitored by Sergeants Violette and Dallman and reported to Inspector Jones. Jones in turn recommended that Donald Smulski receive a formal letter of reprimand. (Ex. 34, 12.) On December 20, 1989, Chief John Laux sustained IAD complaint number 89-260 due to unnecessary use of the

MDT. As a result of Donald Smulski's message, a letter of reprimand was placed in his file and he was ordered to submit to a psychological evaluation. (Ex. 34, 1.)

143. The MDT was often used for personal messages. Donald Smulski's personal message was singled out for special treatment. Donald Smulski explained to Lt. Winslow and Insp. Jones that it was not his wish to embarrass or defame anyone and that the message was not any worse than other messages sent over the MDT. (Ex. 34, 13.) Alisa Clemons worked on the C shift at the Fourth Precinct from March 1, 1989 to November 30, 1989. (Clemons, V. 6, 1135.) She testified that nonwork-related messages were sent by officers over the MDT all the time. (Clemons, V. 6, 1238.) Even the dispatchers engaged in this practice. (Clemons V. 6, 1239.) According to Clemons, "you were guaranteed to get something that you would laugh about before the end of your shift was over." (Clemons, V. 6, 1239.)

144. Donald Smulski is the only example of an officer disciplined for unnecessary use of the MDT. Not one of the supervisors on the Fourth Precinct provided another example of an officer receiving discipline due to sending nonwork-related messages over the MDT. During her time at the Fourth Precinct, which spanned from 1988-1993, Officer Clemons could not remember a single instance of an officer being disciplined for sending a nonwork-related message over the MDT. (Clemons, V. 6, 1239.)

IV. COUNT III-- Gender Discrimination and Harassment

A. Historical Female Exclusion

145. Women have historically faced significant obstacles to full employment as police officers on the Minneapolis Police Department. In 1968, the Minneapolis Police Department required female applicants to have a four-year college degree in psychology or sociology to qualify for employment. Male applicants were required to have only finished high school. (Laux V. 18, 3227-30; Morris V. 25, 4229-31.)

146. The Minneapolis Police Department employed only four sworn female police officers in 1968, the year that Chief John Laux joined the MPD as a police officer. At this time they were restricted to employment in the juvenile division or the sex crimes division or in specific investigative roles created for women. They worked as investigators but had no opportunity to advance from investigative assignments. (Laux, V. 18, 3228-30; Morris, V. 25, 4230-31.)

147. Not until 1975 or 1976 was a woman allowed to compete with male applicants using the same selection process, same testing and same physical requirements. In 1975 or 1976, the first female officer was hired by the Minneapolis Police Department. (Laux, V. 18, 3228-29; Morris, V. 25, 4320.)

148. When John Laux became chief of the Minneapolis Police Department in 1989, there were approximately 50 to 60 women on the MPD. When he resigned in 1994, there were approximately 105 or 106 female employees. (Laux, V. 18, 3229.)

149. Women began to join the Police Department in significant numbers in the mid to late 1980s. Although entry barriers have been removed, the legacy of the all-male working environment continues to present obstacles for female police officers.

150. The City of Minneapolis has adopted a policy relating to sexual harassment. (Ex. 122, 5.) The City of Minneapolis' sexual harassment policy contains a section on Gender Harassment. The General Harassment Policy states in part as follows:

> Gender harassment exists when the work environment is charged with bias against an employee simply because that employee is a woman or a man.
>
> Gender harassment may include the belittling or discrediting of either sex through jokes, remarks or other behavior which creates intimidating, hostile, or offensive working environment. The difference between gender harassment and sexual harassment is that while both create offensive working environments, gender harassment takes place without any suggestion of sexual behavior. For example, it would be considered gender harassment if a supervisor assigned only certain job duties to an employee because the employee was a woman or was a man.
>
> Gender harassment and sexual harassment, although different in their nature, are both forms of sex discrimination. Both violate the City's Affirmative Action Policy and federal, state, and local non-discrimination laws.

Ex. 122, 7.

151. As will be seen from the Findings that follow, the City of Minneapolis has failed to implement or enforce the Gender Harassment Policy in its Police Department.

B. Gender Hostile Work Environment

152. During the entire period in question in this proceeding, Katherine Smulski and her female co-workers were subjected to different treatment in the conditions of employment because of their gender. Katherine Smulski and female co-workers were required to tolerate, as a condition of employment, derogatory sexual comments, sexist or sexual jokes, and vulgar language, posting of sexually derogatory posters and had to endure their complaints being minimized or ignored.

153. Lt. Joey Winslow admits that, in the latter part of 1990, he made the comment in the Precinct offices, in or near the roll call room, that his wife was having her "cunt cut out." (Winslow, V. 27, 4696.) Winslow later admitted that, "There's no doubt that there would have been people assigned to the north side Precinct that would have been offended by that statement." (Winslow, V. 28, 4882.)

154. In the fall of 1990, a number of people were standing by the Fourth Precinct mailboxes and Lt. Winslow told everyone "to clean out their boxes." (K. Smulski, V. 3, 493.) One of the male officers in the group remarked, "Oh, you must mean just the females," a comment clearly playing on a vernacular term for female genitalia. Instead of addressing the male officer's comment, Lt. Winslow replied, "Take it any way you want," and laughed. His tacit approval of this comment reflects a general supervisory willingness to encourage, by either failing to address the comments or by actually participating in the statements, the embarrassing, harassing, and derogatory sexual comments that occur at the Department.

155. Lt. Winslow also made subsequent statements regarding the events to the IAD investigator. His statements reflect a general supervisory attitude that, even when such comments are made, if they were intended as a joke, they are acceptable. Concerning the "cunt" comment, Winslow said, "I may have made a joking remark at the Precinct similar to this, because I know I said something similar to my wife about it in a joking manner." (Ex. 64, 22.) Concerning the "boxes" comment, Winslow said, "There's always a certain amount of joking at roll call by both male and female officers." (Id.)

156. Officer Mary Ketzner stated that Lieutenant Winslow's vulgar language and that of at least one other supervisor was much worse than that described by Katherine Smulski. For example, she stated that Lieutenant Winslow frequently used the word "cunt" at roll call, and usually with reference to his wife. (Ketzner, V. 6, 1124.) Another of the Fourth Precinct supervisors, Sergeant Larson, called female officers "STP cops", which meant "squat to piss". (Ketzner, V. 7, 1280.)

157. At another roll call, Winslow made the comment that, "if the police arrested more women on domestics calls, then the number of domestic calls would go down." (K. Smulski, V. 3, 493.) The comment implies that if the women, who are predominately the victims in domestic calls, were put in jail, they would be quiet and not call the police again. Winslow readily admits that he did make a statement to the effect that if the domestic abuse laws were enforced strictly and technically, both parties would go to jail. (Winslow, V. 28, 4886.) He also explained why he believes arresting both parties will result in fewer domestic calls: "I believe that, number one, if they are both in jail, they are both going to have to go to court and hopefully they are going to get court-ordered help of some kind. . . . The second reason is that if they both go to jail, who is going to call the police the next time?" (Winslow, V. 28, 4887.)

158. During the time Katherine Smulski was stationed to the Fourth Precinct, Sgt. Violette posted a flyer which read, "Wanted: Good women [sic] who can clean and cook fish, dig worms, sew and who owns a good fishing boat & motor. Please enclose

photo of boat and motor." (Ex. 17.) The flyer was signed by Sgt. Violette and was, according to Lt. Winslow, posted in the supervisor's office in the Fourth Precinct, right next to Sgt. Violette's desk. (Winslow, V. 27, 4706.) In asking for a picture of the boat and motor only, the "punch line" of the flyer implies that the fishing boat and motor are more important than the woman.

159. Sgt. Violette posted the flyer in his office, in a location where he could reasonably expect other officers, MPD employees, and the visiting public to see it. Katherine Smulski was offended and disturbed by the poster. (K. Smulski, V. 3, 492.) Officer Clemons found the poster sexist and offensive and thought it was inappropriate for the workplace. (Clemons, V. 6, 1218.) Officer Ketzner also found the poster to be derogatory. (Ketzner, V. 6, 1124.)

160. In October of 1995, a department-issued invitation to the Sixth Precinct's 25th Anniversary Party was posted in a public area in the Robbery/Homicide Unit. (K. Smulski, V. 3, 505.) The invitation was posted in plain view near the front door on a bulletin board where announcements and event information are normally posted. (K. Smulski, V. 3, 504.) The invitation contained a number of historical notes, the first of which was "No woman ever served at the Sixth Precinct." (Ex. 19.) The invitation's language, "Alumni and Friends Welcome," and the location in which it was displayed prove the intent that the invitation be read by sworn and civilian employees. Although historically accurate, listing the fact that no woman ever served at the Sixth Precinct reflects the belief that the Sixth Precinct's ability to exclude women from service there was a noteworthy achievement of which to be proud. The language and posting served to reinforce the negative attitudes toward women Katherine Smulski had already observed from the Department. (K. Smulski, V. 3, 505.)

161. A flyer featuring a cartoon drawing of Santa Claus was posted in the Homicide/Robbery Unit that contained vulgar language and sexual innuendo. The poster read, "This year, Santa's got a new incentive program. Be good or he cuts off your dick. Merry Christmas!" (Ex. 18.) The sexual innuendo of the flyer ("be good") and the vulgar reference to a penis were offensive to Katherine Smulski (K. Smulski, V. 3, 501) and C.J. Irvine (Irvine, V. 8, 1421.)

162. Virtually every woman who took the stand in the hearing for this matter testified that they have been subjected to sexual jokes, sexual comments and/or sexual harassment as members of the MPD. Their experiences give a cumulatively accurate picture of the generally hostile employment environment for women at the MPD and reveal the long-standing patterns of gender discrimination that are practiced there.

163. C.J. Irvine indicated that in her career with the MPD, she has heard officers and sergeants, both male and female, make sexual jokes. (Irvine, V. 8, 1423, 1425.) As an example of the prevalence and types of sexual jokes she was exposed to at the Department, she stated that Officer Wes Reins usually carried a pair of female panties in his coat pocket instead of a handkerchief and would routinely pull it out and wipe his face. (Irvine, V. 8, 1488.) She said that Reins also had a tie with a penis on it,

that "he would roll it up and throw it at you," and that Reins was notorious for his sexual jokes. (Irvine, V. 8, 1488.) Sgt. Irvine testified that "through the years there has just been so much [sexual joking and commenting at the MPD], I don't even know how to explain it." (Irvine, V. 8, 1489.)

164. Officer Clemons shared her experiences with gender discrimination at the MPD and the tremendous stress and anxiety they caused her. When she was sent to Department Officer David Franzen for a mental health assessment, he found that, "Though racial and sexual harassment were discussed along with stress reaction, [their] sessions found that she was not reacting to post shooting stress, but to institutional harassment." (Ex. 52.) Clemons testified that it wasn't until David Franzen communicated this finding to Inspector Otto that she felt that somebody had finally listened to her, looked at the whole picture, and saw that she had been a victim of harassment. (Clemons, V. 6, 1177.) Concerning the specific time frame of Katherine Smulski's complaints, Officer Clemons testified that there was ongoing harassment of women by the Sergeants at the Fourth Precinct that the men were not experiencing. (Clemons, V. 6, 1217-18.)

165. Cari Gerlicher, a witness for the City, heard male co-workers use sexual comments and jokes. (Gerlicher, V. 11, 1892.) The remarks were frequent, and some of those comments were offensive to her. This behavior was not limited to the patrol officers; Officer Gerlicher also heard supervisors make sexual remarks. Officer Gerlicher heard remarks that included use of the words "titties" and "cunt" and the telling of "raunchy jokes." (Gerlicher, V. 6, 1894-96.)

166. Ann Kjos, another witness for the City, employed with the Minneapolis Police Department, had also heard sexual or derogatory remarks about women by male and female officers. (Kjos, V. 12, 2081-82.)

167. Another city witness, Nancy Olson, had also heard sexual comments made by both male and female officers on the department. (Olson, V. 11, 1931.)

168. Shannon Miller, another witness for the City, has heard sexual remarks, sexual jokes and derogatory comments toward women in the four years she has been with the MPD. (Miller, V. 12, 2109-10.)

169. Sgt. Jolene Lindner, another of the city's witnesses, indicated that where she worked, the passing of sexual jokes "is done and it's condoned and approved by all." (Lindner, V. 10, 1833.) Sgt. Lindner also stated that she has, in her career with the MPD, felt discriminated against because of her status as a woman and that there have been occasions when she believed something in the Department happened to her because she was a woman. (Lindner, V. 10, 1805.) She detailed an incident when she was at a crime scene and spoke to a sergeant on the phone who yelled at her and was rude and told her she didn't know what she was doing. When she got off the phone, Sgt. Violette, who was at the crime scene, told her that the reason the sergeant was treating her that way was because she was a woman -- that he never would have done

that to a man. (Lindner, V. 10, 1806-07.) She also described another instance when she transferred to the Organized Crime Unit, which was all men at the time, and she felt they didn't like working with a woman; that they weren't being as warm to her as if she had been a man. (Lindner, V. 10, 1811.)

170. Sgt. Linder, however, indicated that both instances where she felt discriminated against because of her gender were misperceptions on her part. She later learned that the sergeant who yelled at her and was rude to her was also rude to at least one other male co-worker and she concluded that he was simply "a jerk." (Linder, V. 10, 1807.) Similarly, with respect to the move to the Organized Crime Unit, because that assignment was "a very tight-knit unit", they didn't want newcomers, male or female. (Linder, V. 10, 1811.) Sgt. Linder indicated that there were numerous times "where I felt that it is because I am a woman and then later I find out that . . . the very same thing happened" to her male co-workers. (Linder, V. 10, 1807.) Sgt. Linder believed that this was a "interaction problem", not a "discrimination problem". (Id.)

171. Inspector Chris Morris, the highest ranking sworn female officer in the Department and a witness for the City, testified that she had personally heard an officer calling a woman on the street a "cunt" and had personally heard an officer call a woman a "bitch." (Morris, V. 25, 4274-75.) She also testified to having, in her supervisory role with the department, learned of or taken complaints from female officers concerning derogatory/sexist language. She described one complaint in which a male officer, in a conversation with another male officer, used the word "cunt" over the MDT to refer to a female police officer. (Morris, V. 25, 4276.) She described another complaint involving a Fourth Precinct sergeant's use of the terms "broad" or "honey" when addressing female officers, (Morris, V. 25, 4284), and indicated that, as a result of her investigation, she found that the sergeant in question had used such language for many years. (Morris, V. 25, 4316.)

172. Lt. Morris stated that in the time she's been on the Department, she has felt discriminated against because of her status as a woman. (Morris, V. 25, 2759.) Lt. Morris also stated that, during her time with the Department, there were, and probably still are, male officers who expressed the opinion that women should not be police officers. (Morris, V. 25, 4261-62.)

173. The City's witness, Hennepin County Sheriff's Office Inspector Michele Smolley, also indicated that in her ten-year career with the Minneapolis Police Department, she was exposed to sexual remarks on a weekly basis by men and women; heard the term "fuck" used daily; heard male officers refer to females as "cunt"; and heard the term "bitch" used as often as every day or every other day. (Smolley, V. 14, 2426, 2428.) She heard male officers inappropriately referring to parts of the female anatomy as often as every couple weeks. (Smolley, V. 14, 2430.) She heard the words "fuck", "cunt" and "bitch" used inappropriately or in an inappropriate context as often as daily. (Smolley, V. 14, 2426.)

174. The City's witness, Lt. Valerie Wurster, described the Police Department's environment for women and the occurrence of sexist comments and comments derogatory of women. In the course of her 16-year career with the MPD, she has heard sexual remarks by both male and female officers and that she was offended at being exposed to these sexual remarks at her place of work. (Wurster, V. 13, 2303-04.) Lt. Wurster observed that she herself has been a victim of sexual harassment when she was a sergeant, in an incident where a lieutenant put his hand through her open collar and into her blouse and told her he was adjusting her badge. (Wurster, V. 13, 2315.) Although Lt. Wurster filed a complaint about the incident with Internal Affairs, the resolution of that IAD investigation convinced Officer Wurster that complaining about sexual harassment at the MPD was futile. She stated that she came to the decision to confront any future sexual harassers herself immediately because, "if I could not depend upon the police department to handle that appropriately for me, the only satisfaction I would get is to confront the individual directly and immediately and that way I could live with whatever happened." (Wurster, V. 13, 2317.)

175. Lt. Wurster, a 16-year veteran of the Department volunteered, "I don't know too many women who haven't seen some incident of sexual harassment where they either appropriately took action by making a formal complaint or they did not take action and probably feel embarrassed and guilty at that." (Wurster, V. 13, 2306.)

176. In order to be accepted by the male officers in the Department, female officers must resign themselves to the Department's discriminatory environment or risk being ostracized as whiners and complainers. They prove this resignation to the male officers by either (1) not complaining about the pervasive jokes and comments they personally experience, (2) allowing themselves to be demeaned by the comments, or (3) participating in the jokes and comments themselves.

177. Sgt. C.J. Irvine stated that female officers, in order to prove they "are not too frail or feminine to handle the job, adopt a macho kind of attitude, and that includes listening, laughing at and telling sexual jokes." (Irvine, V. 8, 1490.) Sgt. C.J. Irvine stated as follows:

> You learn, as a female, that if you show a vulnerability, they will attack you without mercy. Being offended by a sexual joke or reacting to it will just expose that vulnerability, so to try to protect yourself you accept that mentality and buy into it so that there's no -- to try and protect yourself from more of it.

(Irvine, V. 8, 1492-93.)

178. Female officers try to protect themselves by buying into the mentality, by telling the jokes themselves. In that way, female officers prove that when the male officers tell their sexual jokes and make their harassing and demeaning comments, the female officer is not going to run to the supervisor, is going to be trusted not to complain. "They need to know that there is some trust level there and, as backward as

it seems, telling the jokes convinces them [the male officers] that you are okay." (Irvine, V. 8, 1491-92.) As a result of this working environment, instead of female officers making complaints about the sexual language and discriminatory and harassing behavior, they actually facilitate the discriminatory environment through their participation in telling sexual jokes themselves.

179. This work environment precludes women officers from complaining about the discrimination they face in the comments they hear and the behavior they witness and experience. Officer Ketzner stated, "If this is how [the supervisors] think about women, how could we go in with any complaints and expect to be taken seriously?" (Ketzner, V. 6, 1127.)

180. The record contains substantial testimony from former and current female MPD officers who admitted to participating in this oppressive system by telling sexual jokes or making sexual comments or allowing themselves to be demeaned by male officers in order to be accepted into the department. Jolene Lindner indicated that she participates in the telling of "dumb blonde" jokes and jokes about women and has been referred to as, "Oh, there's the dumb blonde again." (Lindner, V. 10, 1832.) Despite the fact that these jokes are demeaning to women and stereotype women in a derogatory manner, Sgt. Lindner stated, "Yes, [the telling of these jokes] does happen, it's a -- it's that type of thing that I accept and I don't have a problem with, and officers know I don't have a problem with it and so it is, for me, condoned in my workplace with me there." (Lindner, V. 10, 1832.) Sgt. Lindner also testified that she would participate in telling and passing on sexual jokes. (Lindner, V. 10, 1833.) Officer Cari Gerlicher has participated in making sexual remarks. (Gerlicher, V. 11, 1893.) Ann Kjos also made sexual remarks. (Kjos, V. 12, 2082.)

181. Lt. Winslow, in his statement to the IAD investigator who was looking into Katherine Smulski's complaints, commented: "There is a lot of rough language used by police officers and a lot of comments that would probably offend the general public, but is normally accepted by police." (Ex. 64, 23.) When questioned about the pervasiveness of sexual comments at the Department, the city's witness, Michelle Smolley, testified: "Was it part of day-to-day life in policing? Perhaps, yes. It was something that -- I accepted that those things happened in that environment." (Smolley, V. 14, 2433.)

182. Former Chief of Police John Laux himself stated, "I certainly believe there were obstacles, various significant obstacles, for women in any police agency and certainly in the Minneapolis Police Department." (Laux, V. 18, 3228.) Inspector Morris also admitted that it would be fair to say that there have been obstacles to women's ability to compete for advancement within the department. (Morris, V. 15, 2726.) Inspector Morris herself has perceived resistance from male officers to her presence as a female officer and that she believes the resistance is sometimes discriminatory. (Morris, V. 25, 4262.)

183. The obstacles that confronted women were so obvious to Insp. Morris that she held female officers to a higher standard than male officers. In a discussion concerning career advancement within the Department, Insp. Morris told Officer Irvine that, because Morris wanted women to excel in the department, she held women to a higher standard because women needed to perform above and beyond average male officers just to be acceptable and needed to prove themselves in order to do well. (Irvine, V. 8, 1351.)

184. Deputy Chief Jones observed that there were many departments within the MPD that were, and that have traditionally been, predominantly made up of white male officers. (Jones, V. 22, 3707.) Deputy Chief Jones identified Homicide, Narcotics (Jones, V. 22, 3708), Weapons (Jones, V. 22, 3710), and Canine (Jones, V. 23, 4005) as departments that had traditionally been white male units. Officer Wurster also observed a general discriminatory attitude towards women by the males in various departmental units. She agreed that there had been difficult obstacles to getting women represented in some areas of male dominance and echoed Deputy Chief Jones' assessment that Canine and Homicide were units where it was "really tough" to get women assigned. (Wurster, V. 13, 2336.) As to why these areas have been traditionally white male, Lt. Wurster indicated that in the specific case of the SWAT-like Emergency Response Unit, "there were some systemic beliefs that women were not capable of handling the position" but that in the other areas, she said:

> [i]t had more to do with women simply not being a comfortable companion in the unit, the good old boys' club simply not being comfortable with having women around, which has nothing to do with saying you can or can't do the job, whereas in ERU [Emergency Response Unit] I really think they completely believed that women couldn't do the job. In these other units, particularly the investigative units and units like Canine, I think it had more to do with the fact that they were just not comfortable with having women around. It was more like a good old boys' club where they just liked the company of men. . . .

(Wurster, V. 13, 2359.)

C. The Promotability Index

185. Insp. Morris described an incident involving her taking the 1990 lieutenant's examination and the use of the "promotability index" as a factor in her evaluation. Insp. Morris described the promotability index as "an anonymous rating system by people who were, on their honor, to have supervised you during a certain period of time prior to this lieutenants testing procedure." (Morris, V. 15, 2759.)

186. The scores she received on the anonymous rating were low and she felt that her results ranking was lowered because of the promotability index. (Morris, V. 15, 2760.) Insp. Morris said, "I knew that in the Department that was a possibility, that because I was a woman I was ranked lower." (Morris, V. 25, 4325-26.) Insp. Morris

believed that the "promotability index", because it allowed evaluating supervisors to remain anonymous, allowed discrimination, bias and prejudice to be used as factors in the evaluation, resulting in the adverse impact of lower scores and rankings for women and people of color. (Morris, V. 25, 4264.)

187. Personnel Decision Incorporated (PDI) had already evaluated the inherent potential of the "promotability index" to be used as a tool for gender and racial discrimination. In 1990, the "promotability index" was used as a factor in the Sergeant's Examination. Pam French of the Department's Personnel Unit testified that when the results of the 1990 Sergeant's Examination were returned, with the assistance of PDI, it was determined that use of the promotability index in that situation had an adverse impact on women and people of color. (French, V. 26, 4492.) That factor was then thrown out of the sergeant's evaluation process.

188. However, the "promotability index" was not discarded as a factor in the 1990 Lieutenant's Examination. (French, V. 26, 4496.) Pam French stated that the "promotability index" was retained because statistical analysis of the index's use in the Lieutenant's Examination had not shown adverse impact. (French, V. 26, 4496.) However, the reason no adverse impact was shown was because the smaller number of candidates sitting for the Lieutenant's Examination rendered statistical analysis of the scores and results ineffective. (Morris, V. 25, 4324.)

189. Irrespective of the inconclusive statistics, Insp. Morris believed it probable that the adverse impact that PDI had diagnosed when the index was used for the Sergeant's Examination would also be present in the Lieutenant's Examination. (Morris, V. 25, 4265.) She joined Dep. Chief Jones and Lt. Sue Piontek in challenging the Department's use of the "promotability index." (Morris, V. 25, 4263.) The three officers challenged the index with both the Civil Service Commission and the Human Rights Commission. (Morris, V. 4263-64.) Their suit resulted in a 1992 settlement that involved a token cash payment of $1,000 to Jones and larger cash payments to Morris and Piontek, which were calculated based on the pay the women had lost because their eventual promotions were delayed by their low promotability-index-based ranking (Jones, V. 24, 4201.) The settlement also involved an agreement by the Minneapolis Police Department that use of the "promotability index" would be suspended for a period of five years. (Jones, V. 24, 4202.)

190. Insp. Morris believed her low ranking on the Lieutenant's Examination was the result of the "promotability index", a tool Pam French admitted had an adverse impact on women. (Morris, V. 15, 2760.) It was also widely known throughout the Department that the "promotability index" was a tool for gender discrimination and that it had been used to sabotage the examination rankings of women. For this reason, Katherine Smulski refused to sit for the 1990 Sergeant's Examination (K. Smulski, V. 3, 512) and Valerie Wurster refused to sit for the 1990 Lieutenant's Examination (Wurster, V. 13, 2371-72.) Lt. Wurster stated:

> I knew the promotability factor would affect women and minorities negatively. I knew that. That was my sense, that was my deep sense of how that was going to affect the outcome of that exam. And, indeed, it did. There were women and minorities that were affected negatively in such an obvious way that they were really just at the bottom of the list.

(Wurster, V. 13, 2373.)

191. The "promotability index" was an obstacle to women's advancement in the Department because women whose scores and rankings were based on the index received scores so low as to render them categorically out of consideration for promotion. However, that was not the only way in which the index was an obstacle. The index also served to deter women who were otherwise qualified to take the examination from even sitting for it. As Lt. Wurster's behavior and testimony prove, one response that women in the department have if they even perceive that they may be affected by bias if they pursue a certain option, is simply not to pursue it. (Wurster, V. 13, 2373-74.)

192. Lieutenant Wurster also testified that she was a personal victim of gender discrimination as recently as 1993 during her Lieutenant's Examination. (Wurster, V. 13, 2304.) The discrimination occurred in the oral boards phase of the Lieutenant's Examination before the certified list was created. (Wurster, V. 13, 2304-05.) The oral boards are conducted in an interview format: individual applicants are brought in one at a time to appear before a panel of examiners and are asked questions. (Wurster, V. 13, 2310-11.) One of the particular questions asked, "Have you ever seen sexual harassment during your tenure as a law enforcement officer with the police department? And, if you did, what did you do?" (Wurster, V. 13, 2305.) Wurster felt the question was inappropriate since it immediately put the female candidates in a dilemma.

193. The candidate could not say that she had never encountered sexual harassment because, as Lt. Wurster described it, "To sit in an oral interview for the position of Lieutenant and say -- and be a woman on a police department, any police department, and say that they have not seen issues of sexual harassment would clearly, in my opinion, indicate to any reviewer that you haven't been there long enough or your eyes haven't been open, because they do exist." (Wurster, V. 13, 2313.) However, if the candidate admitted to having witnessed or been victimized by sexual harassment she faced a double bind, since there was a good chance she had done nothing about the harassment despite a department policy that mandated she take direct and overt action. (Wurster, V. 13, 2313.) In her own mind, the candidate-victim of sexual harassment "very likely would have said, 'Well, I saw it and didn't do anything because I didn't feel comfortable doing anything.' . . . But that's not appropriate for a sergeant to ever say. You're always supposed to say you handled it. So if a woman were to be called -- to have been a victim of this issue and choose not to handle it, that puts her in a dilemma." (Wurster, V. 13, 2314.) And Valerie Wurster observed that she

knew “for a fact” that some of the women who went through the 1993 Lieutenant's Exam had made a complaint of sexual harassment at some point or had occasion where they could have made a complaint and had consciously chosen not to. (Wurster, V. 13, 2314.)

194. The oral board questions put women candidates in an uncomfortable position that the male candidates did not experience. (Wurster, V. 13, 2314.) That question forced women to immediately deal with an issue on a very personal level and the men were not similarly confronted. (Wurster, V. 13, 2310.) And the disparate impact of that situation on the female candidates was blatant: the women, as a group, all lost points on that section of the exam. (Wurster, V. 13, 2306.) Lt. Wurster described what occurred as follows:

> We -- during the process of the exam, after each phase of the exam you receive a notification that tells you how you did in relationship to how everyone else did. And after that particular portion of the exam, there were -- think there were seven, seven of us or six of us that took the exam. Every woman, every woman lost position; and it wasn't one or two, we all lost substantial positions after the oral exam portion. Only one female did not, who did very well. She's a very talented person and was not offended or did not internalize that question, I would imagine, but the rest of us all did. And it was a substantial loss. One individual went from number 7 on the list to number 23 on the list, and that clearly puts you out of any running for being a lieutenant. You have to finish pretty much in the top 10 to be considered for a position of lieutenant.

(Wurster, V. 13, 2308-09.)

195. The oral boards had a direct and adverse impact on the women candidates who were, by the questions asked, put into an extremely uncomfortable situation that their male counterparts were not subjected to. Despite their equality with the male candidates in terms of their competence and effectiveness as speakers, virtually all of the women lost position in the oral interview. (Wurster, V. 13, 2309.)

D. MPD Ignored or Minimized Complaints by Female Officers.

196. In the first week of November 1990, Katherine Smulski had reached an emotional and psychological breaking point. At this time, Donald and Katherine Smulski decided to file a complaint against Insp. Jones and their other Fourth Precinct supervisors. In November of 1990, they contacted Sgt. Nancy Olson, an investigator with MPD's Internal Affairs Department ("IAD"). On November 11 they met with officer Olson and Sgt. Kulander who was the commander of IAD. (Ex. 63, 4.) They discussed their allegations regarding the supervisors at the Fourth Precinct C Shift and also possible solutions. (Ex. 63, 4.)

197. Donald and Katherine Smulski stated that the bases for the complaint were their claims of sex and marital status discrimination arising from being separated as partners, and the refusal to allow them to use their seniority to select Squads and partners like their Fourth Precinct co-workers. Katherine Smulski also complained about sexually derogatory remarks and comments made by Lt. Winslow. Katherine and Donald Smulski summarized their complaints against their supervisors, including the claim that their performance evaluation scores were inappropriately low. Sgt. Olson and Sgt. Kulander asked the officers for proposals that would resolve their situation. One proposal was to transfer Donald Smulski out of the Fourth Precinct. Katherine Smulski at the time was unable to participate in a decision regarding her transfer. She was advised to take sick leave and seek psychological care through her doctor or through the Department.

198. Sgt. Kulander conferred with Chief Laux, who approved of the following response to the complaint: 1) that Donald Smulski be advised to submit a request for transfer, 2) the Chief approved Katherine Smulski's use of sick leave to deal with her condition, and 3) the Chief approved the initiation of an IAD investigation into the allegations of the complaint.

199. November 4 was the last day that Katherine Smulski worked at the Fourth Precinct. She took sick leave or medical leave due to stress for most of the remainder of November. On or about November 26, 1990, she transferred to the Second Precinct. (Ex. 7.) Katherine Smulski met several times with Sgt. Olson to provide her with documents and explanation of her complaints against Fourth Precinct supervisors.

200. Katherine Smulski provided names of witnesses and names of other women whom she claimed had encountered similar problems. (Ex. 63.) Later that month Inspector Jones provided Officer Olson with the Precinct files on both Donald Smulski and Katherine Smulski. (Ex. 63, 6.) Katherine Smulski dropped off some of her documentation relevant to her complaints on December 11. (Ex. 63, 6.)

201. Katherine Smulski presented her written statement regarding the problems she and Donald Smulski were having on the C shift to Sgt. Olson on December 26. (Ex. 63, 6.) Upon reviewing Katherine Smulski's statement and the documentation she had been provided by Insp. Jones, Sgt. Olson came to the conclusion that "her allegations were either too vague (no witnesses, no dates), contradictory or not addressed by the MPD Manual." (Ex. 63, 9.) Sgt. Olson stated, "Kathy's allegations of discrimination/harassment were in reality supervisor's discretion." (Id.) She felt the only allegations that could be addressed by the Manual were those pertaining to comments made by Lt. Winslow at roll call. (Ex. 63, 9.)

202. Katherine Smulski gave an oral statement to Sgt. Olson dated 12/26/90. She also gave Sgt. Olson a written statement. (Ex. 63.) In her oral and written statements, she specifically identified by name at least 23 persons who she believed knew something about her claims. The persons she identified include the following:

Insp. Jones; Lt. Winslow; Sgts. Thomas, Diaz, Raiche, Violette, Dallman and Larson; Officers Harris, Zierden, Hedberg, Mraz, Krazsa, Hamilton, Doran, Kossan, Sutherland, Osbeck, Bakken, Weseman, Mary Ketzner, and Melissa Anderson. Katherine Smulski's oral transcribed statement and written statement also identified numerous dates when various events giving rise to her claims occurred. (Ex. 63.)

203. She specifically named Officers Ketzner and Anderson as officers who had complained that women received more desk duty than men. (Ex. 63, 16.) She identified Officer Weseman as someone who had also noted that female officers were losing desirable Squad assignments in favor of male officers with less seniority. (Ex. 63, 15.) In the written statement submitted by Donald Smulski and Katherine Smulski, Officer Harris was identified as an officer who noticed that Donald Smulski and Katherine Smulski had not been given their pick of Squads as Lt. Winslow's policy dictated, and who actually had a conversation with Winslow regarding this. (Ex. 63, 21.)

204. On January 2, 1991, Sgt. Olson met with Sgt. Kulander and expressed her opinion that the information Katherine Smulski provided did not warrant an investigation. (Ex. 63, 9.) Sgt. Kulander agreed and the two of them met with Chief Laux. (Ex. 63, 9.) Chief Laux also concurred and determined that an investigation of the sexual/marital status discrimination/harassment claims should not proceed. (Ex. 63, 9-10.) Chief Laux also agreed that Lt. Winslow should be called in for a statement regarding the charge of inappropriate language against him. (Ex. 63, 10.)

205. Lt. Winslow's inappropriate language charge was labeled IAD 90-163. (Ex. 64.) Katherine Smulski's discrimination charge is labeled IAD 90-163A. (Ex. 63.) Chief Laux decided that it was appropriate to close IAD 90-163A, in which he made a finding of "EXCEPTIONALLY CLEARED". (Ex. 63, 96.) On the charge against Lt. Winslow, he made a finding of "not sustained". (Ex. 64, 2.)

206. An actual investigation of Katherine Smulski's discrimination complaint was never initiated. No witnesses were ever interviewed. In her summary of IAD 90-163, Sgt. Olson in part justifies this decision not to investigate by stating that Katherine Smulski failed to provide witnesses. (Ex. 63, 9.) However, in her statement, Katherine Smulski specifically identified Insp. Jones, Lt. Winslow, Sgt. Violette, Sgt. Diaz, and Sgt. Raiche as supervisors she had complaints about. (Ex. 63, 11.) She then identified with particularity

specific dates and incidences of unfair treatment by each supervisor. Katherine Smulski also informed Sgt. Olson that other women on the shift had experienced similar problems with these supervisors. (Ex. 63, 11.)

207. As indicated in Finding 202, Katherine Smulski identified numerous witnesses. Sgt. Olson's conclusions are contrary to the record. Her investigation was inadequate by any reasonable standard. Her failure to investigate, including the concurrence of Sgt. Kulander and Chief Laux, is an example of the MPD ignoring or minimizing complaints of gender discrimination.

208. While an investigation proceeded in IAD 90-163, analysis reveals that it was also incomplete and inadequate. In her statement Katherine Smulski identified three instances where Lt. Winslow made derogatory remarks regarding women:

> [D]uring roll call on several occasions LT. WINSLOW would make derogatory remarks regarding females, such as "If officers arrested the women (victim) in domestic situations, the number of domestic complaints would go down." LT. WINSLOW told officers at roll call that his wife "just had her cunt cut out" referring to a hysterectomy she had just had. Another incident was when LT. WINSLOW asked officers to clean out their boxes (mail boxes). A male officer then said "are you only referring to female officers?" LT. WINSLOW laughed and stated "take it any way you want."

(Ex. 64, p. 18.) In response to these charges, Sgt. Olson only took a brief statement from Lt. Winslow. (Ex. 63, 18-19.) Lt. Winslow admitted to making three of the four remarks (or substantially equivalent remarks) and did not deny making the fourth. (Id.) The only part of Katherine Smulski's accusations that he contested concerned the location at which the remarks were made. (Id.)

209. Sgt. Olson decided that she could not conduct further investigation into Lt. Winslow's remarks. She reached this conclusion because Katherine Smulski failed to give her the exact dates when the remarks were made and failed to identify other persons who were present in the roll call room who may have heard the remarks. (Olson, V. 11, 1970, 1979.) However, Sgt. Olson knew that Katherine Smulski worked on the C shift. Because C shift officers would be present at a C shift roll call, Sgt. Olson could have queried other officers on the C shift. However, she concluded that it was fruitless to pursue the matter further.

210. Section 5-104 subp. 9, of the Policies and Procedures Manual explicitly prohibits "indecent, profane or unnecessarily harsh language in the performance of official duties or in the presence of the public." (Ex. 13, 185; Ex. 64, 2.) Section 5-104, subp.14, in part, provides: "Employees shall be decorous in their language and conduct. They shall refrain from actions or words that bring discredit to the Department."

211. It would appear that, because Lt. Winslow did not specifically deny making the derogatory comments, at least one or both of these provisions would have been violated. However, Sgt. Olson concluded not only that no violation had occurred but, contrary to Lt. Winslow's admissions, that there was a question as to whether the comments were uttered. Chief Laux agreed in his finding of "Not Sustained" on the following basis:

> It is difficult to determine what, if anything, was said by Lt. Winslow because no specifics in some cases as to dates were presented, and in other instances, no witnesses. Given the vague information, no other finding is possible.

(Ex. 64.)

212. The finding of "not sustained" is not credible when viewed in light of Lt. Winslow's sworn statement in the matter. In regards to the comment that his wife "just had her cunt cut out" he stated: "I may have made a joking remark at the Precinct similar to this." (Ex. 64, 22.) Regarding the mail box comment, he replied: "There's always a certain amount of joking at roll call by both male and female officers." (Ex. 64, 22.) And regarding the domestic situations remark, he stated that the comment was to the effect that "if the domestic abuse laws were enforced absolute, both parties would go to jail and the domestic abuse calls would go down." (Ex. 64, 23.) Lt. Winslow did not explicitly deny making any of the remarks in question.[14]

213. Katherine Smulski's experience making an IAD complaint regarding Lt. Winslow's comments typifies the manner in which the MPD failed to address charges of gender discrimination. The incomplete investigation conducted by Sgt. Nancy Olson regarding Katherine Smulski's complaints is an example of the inadequate attention given to gender bias issues raised by female officers in the Minneapolis Police Department. Witnesses describe several additional incidents that provide evidence that the MPD engaged in an administrative and supervisory pattern and practice of minimizing or ignoring such discrimination complaints.

214. In the fall of 1990, Officers Mary Ketzner and Alisa Clemons both served part-time on the MPD's Crack Team, a special investigations unit focused on crack cocaine drug trafficking. (Ketzner, V. 6, 1092-93.) One evening, the team was pursuing a case originally set up by Alisa Clemons. The women on the team ended up being assigned to watch a street corner in Minneapolis while the men on the team, who all had special scrambled radios, were involved in a chase in St. Paul. (Ketzner, V. 6, 1093.) At the end of the shift everyone, including the female officers who were very upset at being sent on an assignment which was never reasonably going to be a part of the evening's drug arrest activities, was called to a meeting at the Narcotics Unit offices. Mary Ketzner admitted to making a sarcastic comment over the radio immediately prior to the meeting. (Ketzner, V. 6, 1093.) Nevertheless, Crack Team supervisor Sgt. Violette accused Alisa Clemons of making the comment and kicked her off the Crack Team. (Ketzner, V. 6, 1094.) The female officers on the Crack Team

were upset and felt they had been unfairly treated because of their gender. They all eventually quit the part-time assignment. (Ketzner, V. 6, 1096.)

215. Ketzner and Clemons met with Chief Laux in March of 1990 and told him about the Crack Team incident. (Laux, V. 18, 3111-12.) From that point on, her life at the Fourth Precinct became increasingly intolerable. (Ketzner, V. 6, 1099.) From the time the women of the Fourth Precinct began sticking together as a group and objecting to what they believed was gender discriminatory treatment in desk duty assignments, Squad assignments, performance evaluations, and sexual jokes, comments and language within the Department, the supervisors of the Fourth Precinct meticulously documented even the most ridiculously insignificant infractions by the female officers. (Ketzner, V. 6, 1099-1100.) During the period from March of 1989 and March 1990, Ketzner met with Dep. Chief Jones between seven and nine times regarding the concerns she had that the Fourth Precinct supervisors were engaging in gender discrimination. (Ketzner, V. 6, 1102.) However, most of the time he was not helpful and, at one point, Jones even threatened her.

216. In a November 21, 1989 meeting between Mary Ketzner and Dep. Chief Jones, which was attended by Police Federation Representative Phil Neese, Jones was upset and argued with Officer Ketzner. (Jones, V. 24, 4191.) At the meeting, Dep. Chief Jones told Mary Ketzner that he had found no discrimination had been perpetrated against her by her supervisors. (Ex. 58.) He did not give any justification for his "finding", did not detail any steps he had taken to actually investigate her claims, and did not provide any rational support for his conclusions.

217. Dep. Chief Jones dismissed Ketzner's complaint of gender discrimination concerning desk duty by telling her that her facts were wrong, with no further explanation. (Id.) Jones also made it clear he wanted her complaints to end. In effect, he told Ketzner that she could come to work, listen to her supervisors and do as she was told, or, if she didn't like that, she could transfer or quit. (Id.) Dep. Chief Jones told Ketzner that the Chief's office was tired of hearing complaints from the C Shift and that he did not want her going to the Chief's office to complain anymore. (Id.) When Officer Ketzner replied that she would take advantage of the Chief's "open door" policy and go to him with complaints if she believed it necessary, Dep. Chief Jones responded that she could go to the Chief if she liked, but that she had to come back to the Precinct to work and she wasn't getting out of the Precinct. (Id.) Dep. Chief Jones' threat that, should she complain to Chief Laux, there would be repercussions awaiting her at the Precinct that she could not escape, was something Ketzner took very seriously. (Ketzner, V. 6, 1106.)

218. Despite over a half-dozen meetings with Dep. Chief Jones where Mary Ketzner voiced her concerns about gender discrimination by her Precinct supervisors, Dep. Chief Jones avoided conducting a legitimate investigation of her complaints, casually dismissed the issues she brought forth with no explanation or justification for his dismissal, and threatened reprisals if she decided to exercise her right to take her complaints up the Departmental chain of command. His behavior is consistent with the

response Katherine Smulski received to her discrimination charges and serves as further illustration of the Department's practice of ignoring or minimizing discrimination complaints.

219. When Mary Ketzner and Alisa Clemons were kicked off the Crack Team, both women met with their immediate supervisors to address the issue. At the meeting, Officer Clemons was accused by Sgt. Violette of being a snitch and of sabotaging the drug investigation by making inappropriate comments on the radio. (Clemons, V. 6, 1142.) Clemons challenged Sgt. Violette to prove his accusations, which he never did. (Clemons, V. 6, 1143.) Dissatisfied with the manner in which her sergeants addressed the incident, Officer Clemons took the matter to Chief Laux. (Clemons, V. 6, 1161; Laux, V. 18, 3111-12.)

220. As a result of going to see the Chief, Officer Clemons received a low performance evaluation score which was supported by the evaluation comment that, "Officer Clemons by-passed her Sergeants and Lieutenant and went directly to the Chief's Office regarding a problem she had, disregarding the Chain of Command." (Ex. 46.) This establishes that Officer Clemons was retaliated against in her performance evaluation specifically for complaining of gender discrimination. Clemons had tried to discuss the problems she was having with her sergeants but, since they were the source of the problems, she went to the Chief when she was dissatisfied with their response. (Clemons, V. 6, 1145.)

221. After complaining to the Chief, Officer Clemons' Fourth Precinct working environment became nearly intolerable. She was called into her supervisor's offices for insignificant incidents that other officers routinely committed but that no other officers in the entire Precinct were being called in for. Clemons was called in for parking her car outside the white lines in the parking lot, for having just one clip on her name tag, for leaving the roll call room when she had to go into the hallway to retrieve her red firearms card from her briefcase for presentation, for not presenting a sick slip on a day she was sick, for having asked permission to go to the bathroom, and for leaving her district to respond to an "officer needs help" call, one of the highest priority calls in the Department. (Clemons, V. 6, 1146.)

222. Officer Clemons believed she was being harassed and discriminated against by her supervisors and she voiced those complaints by writing a letter to then-Lieutenant Jones, which she also sent to the Precinct Inspector. (Id.) She wrote that she could no longer handle the discriminatory treatment she was receiving and that if no one from inside the Department was willing to assist her in resolving the problem, she would go to someone outside the Department for help. (Clemons, V. 6, 1168.)

223. As a result of Officer Clemons' letter, she and Jones set a time to meet; when Clemons showed up for the meeting, however, Jones told her that, because he refused to meet with her alone, Lt. Winslow was going to sit in on the meeting. (Clemons, V. 6, 1168.) When Clemons told Jones that, she did not want to discuss her issues in front of Winslow because Winslow was part of the problem, Jones told her that

she was responsible for finding another person to sit in on the meeting. (Clemons, V. 6, 1168.)

224. After Juanita Adamez, an officer in the Third Precinct, agreed to join the meeting, Clemons and Jones met. Clemons discussed with Jones everything that had happened to her up to the time of the meeting, including the Crack Team incident and the harassment she was experiencing from supervisors who were writing her up for ridiculously trivial incidents. (Clemons, V. 6, 1172-73.) After Clemons told Jones all about the problems she faced at the Department and the discrimination she had experienced, Jones promised her that, after their meeting, he would tell Lt. Winslow to be sure they were being fair on the shift. (Clemons, V. 6, 1172.) Although Lt. Winslow did not recall receiving that instruction from Jones regarding the incident, Jones did put a memo in Clemons' file that he had addressed the issue of fairness with Winslow. (Ex. 49.)

225. The other thing Jones did after the meeting was to hand Clemons a slip of paper that he had prepared before the meeting (Clemons, V. 6, 1168) ordering Officer Clemons to see either Dave Franzen, a support officer in the department, or Dor & Associates, a firm of psychologists and psychiatrists, for a mental assessment and referral. (Ex. 48.) Jones told Clemons that she was to have an assessment because the problems she was having were the result of a shooting incident in which Clemons was involved. (Clemons, V. 6, 1169.) However, the shooting Jones referred to had occurred two years earlier and Officer Clemons had already seen Dave Franzen concerning that issue and had fully dealt with it. (Clemons, V. 6, 1173.) Clemons knew that the real discrimination she had been experiencing in 1989 and 1990 had nothing to do with the shooting in 1988 and she had not mentioned the shooting or anything related to the shooting during her meeting with Jones. (Clemons, V. 6, 1174.)

226. Clemons arranged to meet with Franzen (Ex. 50) and eventually saw him twice for evaluation. (Clemons, V. 6, 1175.) Although Clemons did not feel it was necessary to see Franzen after those two visits (see Ex. 51), she did meet with him a third time in order to ask him to put the results of his assessment in writing. (Clemons, V. 6, 1175.) A written memorandum from Dave Franzen to Insp. Otto was the result of Clemons' request. (Ex. 52). In the Memorandum, Dave Franzen stated:

> Though racial and sexual harassment were discussed along with stress reaction, our sessions found that she was not reacting to post-shooting stress, but to institutional harassment. Officer Clemons followed through with the recommendations made by me, and counseling was terminated at her request.

(Ex. 52.)

227. Franzen's memorandum helped her realize that the frustration that she had been experiencing was not a figment of her imagination and was not the result of

stress from a shooting two years past, but was institutional harassment by her supervisors on the Fourth Precinct C Shift. (Id.)

228. Alisa Clemons believed that she was being discriminated against. She had complained repeatedly of the discrimination and the MPD was on notice of her complaints, yet her supervisors, Jones and Winslow, chose to do nothing. When asked how she felt Jones had dealt with her charges of discrimination, Clemons said:

> He didn't, he never dealt with them. He never dealt with them. I think he would have rather you just shut your mouth and never told him what was going on because he didn't want to have to deal with it, have to make a decision or something.

(Clemons, V. 6, 1241.)

229. The MPD has no effective mechanism for dealing with human rights discrimination complaints by officers. For example, in the investigation of the sex and marital status complaint by Katherine and Donald Smulski, Sgt. Olson was unable to identify a violation applicable to the situation. This may be in part due to her summary conclusion that there was no such violation. However, it is as much likely the result of a resignation that the IAD complaint procedure does not lend itself to resolving these kinds of complaints. Even Chief Laux was resigned to the assessment that the MPD was not best equipped to evaluate human rights claims. Sgt. Olson states in her report:

> Laux stated that he had no problem with the Human Rights Department looking into this case and felt that if they were to find any validity to these allegations, they would be better prepared to deal with the Smulski's complaints as opposed to our Internal Affairs process.

(Emphasis added.) (Sgt. Olson's summary contained in Ex. 63.)

230. When Dep. Chief Jones revised the Department's dress code policy in January 1995, the uproar over the changes was felt throughout the Department. Jones commented on this fact in a Departmental newsletter, Viewpoint, and stated that he was "surprised how much controversy such a thing can generate." (Ex. 60.) Officer C.J. Irvine felt the changes to the policy were discriminatory and had a discriminatory effect on women. First, she felt there was insufficient female input into the changes. (Irvine, V. 8, 1403.) Second, she felt the changes would financially impact women more harshly than they impacted men, as women's clothes are generally more expensive than men's clothing. (Irvine, V. 8, 1402-03; Jones, V. 22, 3823.) Third, she felt that while men were being allowed to wear clothing fashionable at the time, including Dockers brand type slacks and turtleneck shirts, the women were not being allowed to wear women's clothing of the current fashion -- stretch and stirrup pants. (Irvine, V. 8, 1399-1400, 1487.) Finally, Officer Irvine felt that the policy was discriminatory on its face, as it contained no language prohibiting men from wearing any items of clothing unique to

men but it did contain a specific prohibition against an item of clothing unique to women. (Irvine, V. 8, 1400.)

231. Officer Irvine brought her concerns to Dep. Chief Jones' attention in a meeting in January 1995. (Irvine, V. 8, 1416.) Officer Irvine raised her concerns about the revisions and Dep. Chief Jones recalled that Irvine complained that the dress code was unfair to women. (Jones, V. 22, 3816.) Irvine also raised an additional issue concerning why the new dress code was discriminatory; that there were biological reasons that women wore stretch and stirrup pants. (Jones, V. 22, 3858.) Officer Irvine was not the only sworn employee to complain about the dress code. Several other women also went to Jones and complained that they thought the new dress code might be discriminatory. (Jones, V. 22, 3826.) Jones admits to having been aware of all these women's complaints and yet he did nothing to investigate them.

232. When Irvine told Jones she felt there should have been more female input into the dress code, Jones responded by saying that if Irvine wanted more female representation in issues then women officers should get more women elected to the police union. (Irvine, V. 8, 1403.) When Irvine alleged that the new dress code was discriminatory, he admits he did not feel her complaints of discrimination merited his attention "because the department has to set a dress code . . . ." (Jones, V. 22, 3858.)

233. Dep. Chief Jones' response ignored the underlying charge, for while it may have been true that the MPD needed a dress code, it was his responsibility in revising the code -- especially after so many women complained -- to assure that the new policy was not facially discriminatory against women nor discriminatory in its impact on women. When Irvine gave biological reasons as support for her discrimination charge, Jones admits he did not pursue what she meant. (Jones, V. 22, 3857.) Jones stated that all she said was "biological reasons" and that, "Had she gone on to explain what she meant, I might have given that more credence or emphasis. I guess I didn't understand what she meant by that, and I still don't." (Jones, V. 24, 4131.) However, Jones also indicated that, although he didn't understand what she meant, he did not ask her what she meant, did not send any written documentation to Irvine asking for an explanation, and did not pursue the matter at all. (Jones, V. 24, 4130.)

234. In 1989, Mary Ketzner appealed her score on a Departmental Performance Evaluation. She believed her low evaluation score was the result of discrimination against her by her supervisors. The first evaluation ("original") had been submitted and forwarded to personnel but when Officer Ketzner appealed her score, the Chief of Police sent the evaluation back to the evaluators to be revised. See discussion in Finding 135. The evaluators submitted the changed evaluation ("revised") through normal channels. When the revised evaluation failed to satisfy Chief Laux, he prepared his own evaluation, changing the scores that Mary Ketzner had contested. Chief Laux rasied her scores so as to eliminate all unacceptable scores. The evaluation that was completed by Chief Laux ("final") became Mary Ketzner's official evaluation for the period.

235. Despite the fact that only the "final" version was valid for official police personnel and management business, the "original" and "revised" versions were placed in Mary Ketzner's personnel file along with the "final" version. In 1993, Mary Ketzner discovered that the "original" and "revised" evaluations were still in her file and, concerned that the incorrect and discriminatory information contained in those versions was still in her personnel record, she requested Pam French of the Personnel Office to remove the first two evaluations from Ketzner's personnel file and give them to Ketzner.

236. French had previously received requests from officers to remove material from the officer's personnel files. Most of the time, these requests related to officers being disciplined, where there was an agreement that after a period of time, some document relating to the disciplined could be removed from their file. (French, V. 26, 4516.) There was no official policy governing what was to be done with materials removed from personnel files. (Jones, V. 32, 5362.) Under those circumstances, the Personnel Department practice was to remove the document from the file and mail the document to the requesting officer, to let them know the item had, indeed, been removed. (French, V. 26, 4532.) When Mary Ketzner requested the original and revised versions of her performance evaluation, Pam French, in light of the Personnel Department's normal practice regarding a document removal request, promised to give the two original versions to Officer Ketzner. (French, V. 26, 4533; Ex. 105.)

237. In July of 1993, Pam French and Dep. Chief Jones, who was then assigned to the Administrative Services Unit, discussed the fact that the "original" and "revised" versions were in Ketzner's personnel files when they shouldn't be. (Jones, V. 31, 5348.) Dep. Chief Jones was aware that Ketzner wanted the old evaluations taken from her file. (Jones, V. 31, 5345.) Jones also knew that no Department policy prohibited Ketzner from having the two versions she had requested. (Jones, V. 31, 5402.) However, once Dep. Chief Jones removed the two documents from Ketzner's personnel files, instead of giving them to Pam French to be forwarded to Mary Ketzner, he shredded the documents in front of Pam French. (Ex. 105.)

238. The significance of Jones' conscious decision to shred the original and revised versions of the evaluation comes, first, from the fact that he was destroying evidence that pertained to Ketzner's continuing allegations that the evaluation had been completed by her supervisors as a tool of discrimination.

239. Dep. Chief Jones' act of shredding Ketzner's discredited performance evaluations occurred during the summer of 1993, on the eve of Officer Linda Lachner's discrimination case against the Minneapolis Police Department. Jones knew that Linda Lachner's case included charges that Fourth Precinct performance evaluations were discriminatory against women. (Jones, V. 31, 5345, 5348.) Dep. Chief Jones was specifically questioned about Mary Ketzner's performance evaluation appeal during his Lachner testimony. (Jones, V. 31, 5425.) He testified in the Lachner case on August 6, 1993, exactly two weeks after the day Pam French wrote the memo to Mary Ketzner that informed her that Dep. Chief Jones had shredded the original and revised versions. (Jones, V. 31, 5348; Ex. 105.) Jones stated that he was aware of the issues

in the Lachner trial (and that those issues included the discriminatory use of performance evaluations), and that he was aware of these issues prior to his testimony in that case. (Jones, V. 31, 5344.)

240. At the time Jones shredded the early versions of Ketzner's evaluations, he was unaware that the personnel department had copies of the documents on microfiche. (Jones, V. 31, 5363.)

241. Jones believed he was shredding the only existing copies of Ketzner's discriminatory evaluations on the eve of a trial in which gender discrimination in Fourth Precinct performance evaluations was to be a major issue.

E. Desk Duty Assignments on C Shift.

242. Desk duty is generally not a desirable assignment for patrol officers. Sgt. Raiche testified that "desk duty for some people isn't a very pleasant experience." (Raiche, V. 2, 245.) Lt. Winslow conceded that "just about everybody complained about working the desk." (Winslow, V. 27, 4712.) Like other patrol officers, Katherine Smulski did not enjoy working the desk. She was a young aggressive police officer who enjoyed working the street. (K. Smulski, V. 1, 173.) According to her, the general perception among officers on the C shift was that working the desk was not very desirable. (K. Smulski, V. 1, 173.)

243. There were women on the C shift who requested to work the desk for a variety of reasons, including light duty work and finishing college degree programs. (Harris, V. 13, 2120-21.) There were also certain officers, male and female, who were assigned permanent desk duty at their request. (Harris, V. 14, 2469.) Sgt. Don Harris, who was assigned as a patrol officer at the Fourth Precinct C shift from November of 1987 to January of 1989, pointed out that during his time on the shift there were maybe eight days a month that desk duty needed to be covered by other officers. (Harris, V. 14, 2469.)

244. In 1989 and 1990, women on the C Shift voiced their concerns that, as Ketzner, Harris, and Katherine Smulski all testified, they were being assigned the desk with undue regularity. There is some evidence to suggest that women were assigned to cover the desk more often than men. For instance, city witness Sgt. Harris stated that in his opinion, women on the C Shift were assigned to the desk more often than men. (Harris, V. 13, 2120.) Mary Ketzner stated that during her time on the C Shift:

> [I]t seemed like any time anybody called in sick or they needed somebody to fill in on the desk, which was like being a secretary and answering phones, they always put one of us women on there. No matter how much time we had on, we were always the ones to be pulled from the car and put on the desk.

(Ketzner, V. 6, 1054-55.)

245. Katherine Smulski believed that she was being assigned to the desk more than her male counterparts. (K. Smulski, V. 1, 174.) Katherine Smulski provided documentary evidence to Nancy Olson, the IAD investigator assigned to her complaint of discrimination that showed her being assigned desk duty nine times in 1990, the most of any officer.[15] (Ex. 63, 9.)

246. Desk duty was sometimes used to punish officers. Sgt. Harris testified that there have been times that "it appeared as though a supervisor had a problem with a particular officer and, as a result, they might wind up with more desk days." (Harris, V. 14, 2467-68.) The desk was at times referred to by officers as the "penalty box". (Harris, V. 14, 2466.) It was a fairly common joke that if you were working the desk you must have done something to anger the Sergeants, "particularly if you worked it a number of times in a given month." (Harris, V. 14, 2466.)

247. Sgt. Raiche, a supervisor on the Fourth Precinct C Shift, was responsible for making the desk assignments for the month of November 1990. When the schedule came out, both Donald Smulski and Katherine Smulski were assigned to the desk two days for the month of November. (Ex. 6, 24.) Upon seeing the assignments, Donald Smulski approached Sgt. Raiche on November 4 and expressed concerns regarding his desk assignment. (Ex. 6. 24.) Donald Smulski felt that desk assignments should be done according to seniority and was concerned because he had been given more desk duty than less senior officers. (Ex. 6, 24.) Sgt. Raiche, upon listening to Donald Smulski, reluctantly switched the desk assignments to include officers who were assigned to primary Squads. (Ex. 6, 24.)

248. Shortly thereafter, Katherine Smulski approached Sgt. Raiche and asked him why she was assigned to the desk two times in November. (K. Smulski, V. 1, 175, Ex. 6, 24.) Sgt. Raiche informed her that people on primary cars do not work the desk. (K. Smulski, V. 1, 175.) When she inquired how she could get a primary car he told her to go to a different Precinct. (K. Smulski, V. 1, 176.) Instead of reducing her desk time, Raiche increased it from two days to four days. (Ex .6, 24.) The two additional days he gave her had originally been assigned to two male officers. (Ex. 63, 17.)

249. Sgt. Raiche assigned Katherine Smulski extra desk duty because 1) "she just happened to be there" (Raiche, V. 2, 252); 2) he had spent too much time working on the schedule for desk duty assignments and just wanted to get it over with (id.); and 3) he felt "hornswoggled" by the fact that "she was coming in on [Donald Smulski's] tail and wanting the same sort of thing." (Raiche, V. 2, 320, 325.)

250. In response to Katherine Smulski complaining about what she felt was unfair treatment, Sgt. Raiche wrote in a memo:

> I reconsidered assigning primary Officers on primary sqds to the desk. Because Kathy brought it up, I assigned those days, (18th, 24th) to

her also . . . I am not singling out anyone, with the exception of 18th/24th.

(Ex .6, p. 24.)

251. The City's own witness, Nancy Olson, interpreted the memo as Raiche giving two additional days of desk duty to Katherine Smulski "because of her complaints." (Olson, V. 11, 1959.)

252. A review of the record is inconclusive as to whether women officers assigned to the Fourth Precinct were assigned desk duty more often than men in 1989-90. However, the assignment by Sgt. Raiche of desk duty to Katherine Smulski on November 4, 1990 contains elements of reprisal, marital status discrimination and sex discrimination. Katherine Smulski complained to Sgt. Raiche that male officers with less seniority were not assigned to the desk as often as she had been assigned. Sgt. Raiche took reprisal against Katherine Smulski by assigning her two additional days. One of his motivations for this was because her husband, Donald Smulski, had previously complained about the same issue.

F. Refusal to Promote to Weapons Position.

253. In October 1993, long after Katherine Smulski had transferred out of the Fourth Precinct, she was assigned to the Weapons and Domestic Assault Unit. (K. Smulski, V. 3, 512.) When she was first assigned to the Unit, Insp. Morris told Katherine Smulski that her responsibilities were to be split with 50 percent of her work in Weapons cases and 50 percent in Domestic Assault cases. (K. Smulski, V. 3, 512.) At the time, however, there were a tremendous amount of Weapons cases and Katherine Smulski soon realized that her service in the Unit was more like 90 percent Weapons cases and 10 percent Domestic Assault cases. (K. Smulski, V. 3, 515.)

254. Katherine Smulski enjoyed her Weapons work. When patrol officers found weapons as part of their field work, the weapons would be seized and that aspect of the case would be turned over to Officer Smulski. (K. Smulski, V. 3, 513-14.) Her duties included conducting background investigations and interviews that would be used in determining whether to forward the case to the Bureau of Alcohol, Tobacco and Firearms. (K. Smulski, V. 3, 514.)

255. When Katherine Smulski first joined the Weapons Unit, Sgt. Chris Hildreath was the full time person assigned to the Weapons unit. (K. Smulski, V. 3, 516.) His responsibilities included releasing weapons to the public once the case ended or was dismissed, teaching new recruits to the force and other officers on the department, and dealing with outside agencies. (K. Smulski, V. 3, 514-15.) By virtue of the position, the full-time Weapons Officer was able to make extensive professional contacts throughout the department and with outside law enforcement agencies. (K. Smulski, V. 3, 514-15.) It was a highly desirable job and Katherine Smulski knew, from

the time she joined the Domestic Assault/Weapons unit, that Weapons experience was necessary to be considered for the fulltime position. (K. Smulski, V. 3, 518.)

256. Officer C.J. Irvine was already working in the Weapons/Domestic Assault Unit when Katherine Smulski was assigned there in 1993, although Irvine was doing predominately domestic assault cases. She agreed with Katherine Smulski that the full-time Weapons position was a highly desirable job because the person in that position interacts with outside agencies, develops a reputation in the Department as knowledgeable, teaches the rookie class, and interacts with the City Council and the Mayor (C.J. Irvine, V. 8, 1362-63.)

257. Katherine Smulski's Weapons work in the Unit was much broader than C.J. Irvine's. Although C.J. Irvine investigated Weapons cases just as Katherine Smulski did, Sgt. Smulski was more proactive in her Weapons work by also keeping statistics on types of guns that came in and on defendants, becoming very knowledgeable about the kinds of weapons the Unit was seeing, cross-referencing defendants in other cases, educating herself with the County Attorney about the charging involved in Weapons cases and about the difference between a conviction and a stay of imposition, and becoming more involved in the overall idea and the administration of the weapons laws within the department. (Irvine, V. 8, 1360-61.) Katherine Smulski was as aggressive and ambitious in the Weapons Unit as she had been in all her previous assignments.

258. In the summer of 1994, Michele Smolley was promoted to Lieutenant and assigned to the Weapons/Domestic Assault Unit, where Katherine Smulski was already working. (Smolley, V. 13, 2206.) After joining the Unit, Lt. Smolley determined that Katherine Smulski was a very capable investigator, able to handle any case given to her. (Smolley, V. 13, 2220.) Smolley also found that Katherine Smulski managed her cases well and handled them appropriately. (Smolley, V. 13, 2220.)

259. In May of 1994, Sgt. Hildreath, the full time Weapons officer, was transferred to a position as a street supervisor. (K. Smulski, V. 3, 516.) Katherine Smulski, whose police work was 90 percent Weapons cases and who had developed experience and skill in weapons work, applied for the position vacated by Hildreath, despite the fact that the vacancy was not officially posted (Irvine, V. 8, 1379.) Katherine Smulski spoke with Lt. Smolley about the opening in June of 1994 and sent a follow-up memo expressing her continuing interest in July. (Ex. 20.)

260. C.J. Irvine was also interested in working more with the Weapons Unit. When Irvine learned that the full-time position had been opened by Hildreath's transfer, she believed that Katherine Smulski would, with her Weapons experience, step into the full-time position and Officer Irvine wanted the be considered to fill the part-time Weapons position that Katherine Smulski would be leaving. (Irvine, V. 8, 1379.)

261. Lt. Smolley was aware that both Katherine Smulski and C.J. Irvine were interested in the Weapons positions. (Smolley, V. 13, 2225.) Smolley went to discuss

their candidacy with Capt. Simmons, who was ultimately responsible for the hiring decisions concerning that department. (Smolley, V. 13, 2226.) Captain Simmons' response was that he had already made his decision concerning the Weapons position and that his decision would stand. (Smolley, V. 13, 2225-26.) However, Lt. Smolley promised Katherine Smulski that she would consider Smulski's interest should the Weapons position become available. (Smolley, V. 13, 2226.) When Officer Irvine approached Capt. Simmons to discuss the position, Capt. Simmons told her that he did not know that C.J. Irvine and Katherine Smulski were interested in the Weapons position and so he had made his decision and would not change his mind. (Irvine, V. 8, 1379.)

262. Capt. Simmons assigned Sgt. Greg Hirsch to the full-time Weapons position. (Irvine, V. 8, 1379.) Greg Hirsch had, in all respects, less experience than Katherine Smulski on the Minneapolis Police Department. First, Katherine Smulski joined the MPD in 1987, Hirsch did not join the force until 1989. (K. Smulski, V. 3, 520.) Second, Katherine Smulski had been promoted to Sergeant in 1993 while Hirsch did not make sergeant until 1994. (K. Smulski, V. 3, 520.) Finally, and most importantly, Hirsch had absolutely no experience investigating Weapons cases, whereas Katherine Smulski had been working predominately in Weapons since 1993. (K. Smulski, V. 3, 519.) Even Lt. Smolley admitted that, although Hirsch had done some investigation work before his Weapons assignment, working Weapons cases was a different type of investigation from anything he had done before. (Smolley, V. 13, 2219.) Because of this, Hirsch required more supervisory assistance. (Smolley, V. 13, 2219.)

263. Katherine Smulski was devastated by the news that Greg Hirsch was being assigned to the full-time Weapons job -- a job she believed that she was clearly better qualified for - and she ended up across the hall from her office in tears. (K. Smulski, V. 3, 520.) Considering Katherine Smulski's experience as compared with Greg Hirsch's experience, Lt. Smolley said she could understand why a sergeant in Katherine Smulski's position was concerned that Hirsch was selected and she wasn't. (Smolley, V. 14, 2414-15.)

264. In January 1996, the MPD administration decided to combine the Weapons Unit with the Vice and Gang Intelligence Units of Organized Crime. (K. Smulski, V. 3, 521.) As a result of this reorganization, a job posting was made for Sergeant Investigators in the Organized Crime Unit (Ex. 21), which was understood to relate to the Weapons duties being taken on by that Unit. (K. Smulski, V. 3, 521.) At the time of the memo, there was no one assigned to Weapons duty, and it was uncertain how many people were being hired. (K. Smulski, V. 3, 529.) Katherine Smulski sent a timely memo to Lt. Johnson, who was to supervise the Weapons assignments under the new arrangement, and stated her interest in the position. (Ex. 22.) She also listed her qualifications and detailed her experience. (Ex. 22.) However, Katherine Smulski was never interviewed for the position and no one even contacted her about her application. (K. Smulski, V. 3, 524.)

265. In fact, other sergeants were hired for the Weapons jobs. A memo from Lt. Johnson to Katherine Smulski indicates that both Connie Leaf and Jeff Rugel were hired by the Organized Crime Unit for Weapons-related duty. (Ex. 23.) T.R. Peterson also took a position described in the memo. (K. Smulski, V. 3, 529.) None of these people had Weapons experience and Katherine Smulski did. Katherine Smulski was again denied a full-time Weapons position while openings were filled by less experienced male officers.

266. Subsequent to these January 1996 assignments, Katherine Smulski once again learned that a Weapons position was open. (K. Smulski, V. 3, 531.) Despite the fact that Lt. Smolley had promised Katherine Smulski that she would be considered for future Weapon position openings and despite Lt. Johnson's promise to keep Katherine Smulski's resume on file for future consideration (Ex. 23), Katherine Smulski was not contacted about the position. It was filled by Sgt. Mike Martin. (K. Smulski, V. 3, 531.)

G. Posting of Internal Job Openings.

267. The MPD does not have a uniform policy governing the manner in which job openings within the Minneapolis Police Department must be posted. There is no policy requiring that job vacancies be posted at all. (Jones, V. 22, 3744-45.) The effect of this is that individual officers are not notified of employment opportunities within the department in which they might be interested and are, therefore, unable to pursue those opportunities. (Jones, V. 22, 3745.) Without a posting policy, "it seemed that a lot of people were not aware of vacancies of a job that people might want." (Jones, V. 22, 3745.) Under such a system, vacancies can be filled without everybody having knowledge of it. (Jones, V. 22, 3745.)

268. But posting jobs does not just benefit the officers who might be interested in taking the open position. Posting vacancies also makes commanders and supervisors aware of people within the Department who might be good candidates for the job but with whom the commander might not otherwise have contact. (Jones, V. 22, 3747.) Dep. Chief Jones admitted that commanders operate within their own sphere of contacts and that they may not know there is a person out there who might be good for an opening without having posted the job. (Jones, V. 22, 3747.)

269. Dep. Chief Jones did briefly attempt to start a uniform job posting policy, however, his efforts were not successful. In the end, Jones only submitted a recommendation to the administration that the Department not implement a policy mandating job postings and, instead, only encourage the posting of all openings in some units. (Jones, V. 22, 3747.) However, even Jones' recommendation, which, again, is not an adopted Department policy, does not articulate which units' positions should be posted. (Jones, V. 22, 3750.)

270. With no rules governing the process of posting job vacancies, some jobs are posted and some jobs are not. (Jones, V. 22, 4055.) It is often up to the

commander whether an opening is posted or not, but there are no guidelines or criteria in place to govern his decisions. (Jones, V. 24, 4056-58.)

271. The outcome of this system is that commanders are not aware of all the qualified people who are interested in a given vacant position. (Jones, V. 24, 4060.) It is, as Dep. Chief Jones admitted, impossible for every supervisor responsible for filling job vacancies to know of every Minneapolis Police Officer's departmental history, training record, educational background, MPD policing experience, job interests, career goals, working style, field techniques, investigatory abilities, public relations skills, judgment, character or personality. (Jones, V. 24, 4063-65.) Jones admits, "A supervisor's or commander's pool of candidates for a particular job opening, because they don't have firsthand knowledge of all of these things, may not include every officer on the department who has the experience and the skills and the abilities to fill that position, that's right." (Jones, V. 24, 4065.) When job openings are not posted, the pool of potential candidates is limited to those officers about whom the supervisor has personal knowledge. (Jones, V. 24, 4067.)

272. When asked how supervisors learn of potential candidates for job openings when the position is not posted, Dep. Chief Jones stated that, "Supervisors sometimes have to base it on their knowledge of people or they will ask other officers, 'Who do you recommend to come in and take this position?' A lot of it is done by word of mouth." (Jones, V. 24, 5426.) When jobs are not posted, supervisors make transfer and assignment decisions based on who they know or who they are told about.

273. In some cases, however, a supervisor's desire to place a person they know and want in a position precludes them even posting a job at all. A supervisor discovers he has a job vacancy on his hands, looks first to see whether he knows anyone he would like to put in the position and only if he does not have such a person does he consider posting the opening. (Smolley, V. 13, 2247-48.) The assignment process is, in effect, driven by the supervisor's personal predilections, as opposed to being driven by candidate interests and qualifications.

274. Dep. Chief Jones identified a common supervisory practice in the Minneapolis Police Department to target certain officers for promotion and advancement and claimed the practice has been in place during his MPD career. (Jones, V. 24, 4079.) In fact, Jones credits his own career to this "fast track." Dep. Chief Jones testified that people in the Department identified him as someone they wanted to move up and they made sure that he was assigned positions of diverse experience and increasing responsibility. (Jones, V. 23, 3813.) They wanted to promote him to positions of greater authority. (Jones, V. 24, 4071.) Jones was able to specifically identify the supervisory officers that were responsible for advancing his career. These men included Bob Lutz, Chief Bouza, and Sgt. Dobrotka, who first identified and targeted Jones while Jones was working in the Canine Unit and who later "became a deputy chief . . . in a position to facilitate my moving along the fast track." (Jones, V. 24, 4072.)

275. Jones received key assignments to the Juvenile, Internal Affairs, and Administrative Services Division, (Jones, V. 23, 3813-15), and he did not even have to go to the trouble of making a formal request for transfer in order to get these assignments. (Jones, V. 24, 4067.) In the case of Jones' transfer to Administrative Services, a position he suggests assured him of promotion, all he had to do was generally make his wishes known that he would like to have the assignment, and he got it. (Jones, V. 24, 4069-70.)

276. With Dep. Chief Jones in a position of tremendous responsibility with the Department, he is now in the position to assist those select officers that he targets for special treatment. And he actively does so. Officer Eddie Frizell was a person Jones targeted who got a position in recruiting. (Jones, V. 24, 4076.) Don Harris is an officer who wanted to go to Canine and Jones helped put him there. (Jones, V. 24, 4076.) Lee Edwards is an officer Jones targeted and then assigned to a patrol beat that helped Edwards get a good reputation, an aid to promotion. (Jones, V. 24, 4077.) Jones also put a good word in to the chief concerning Lee Edwards and Officer Edwards is now working as Chief Olson's Administrative Assistant. (Jones, V. 24, 4078.) Chris Arneson is another officer who Jones targeted. Arneson has received a broad range of experiences, including serving as the Chief's Administrative Assistant, and she is now working in the Homicide Unit. (Jones, V. 24, 4078.)

277. Jones also described how he "also would tell the chief, you know, you may not be aware of officer or sergeant so-and-so, but this is a person who you should consider for increasingly important and difficult jobs to make them better candidates for higher positions." (Jones, V. 31, 5387.) Other supervisors on the Minneapolis Police Department also engage in this targeting of officers, making it a systematic practice. Jones identified Lucy Gerold, Dep. Chief Hestness, Dep. Chief Schultz, and the Chief of Police as supervisors who he personally knew facilitated the careers of officers they had targeted. (Jones, V. 24, 4079.) Insp. Morris testified herself that the process of putting MPD employees on the "fast track" by making sure they get certain experience to make them both well-rounded Officers and better candidates for promotion was something she did. (Morris, V. 25, 4250.)

278. Under the current system, supervisors have the ability to specifically exclude female officers from positions because supervisors have unlimited discretion in making assignments. Although Dep. Chief Jones stated that his personal activities are motivated by his individual commitment to diversity, he admitted that such laudable goals may not apply to every supervisor. (Jones, V. 31, 5414.) Dep. Chief Jones admitted that there are some MPD supervisors who are motivated by discrimination. (Jones, V. 24, 4210.) The current discretionary system of transfer and assignment at the Minneapolis Police Department allows supervisors who are filling positions to exercise gender bias in making assignments.

279. Irrespective of supervisor intent, the current system simply does not give women and minorities the same preferential treatment in this system that white males

receive. First, supervisors promote people that they know or that they learn of from people they know. (Jones, V. 24, 4101-02.)

280. Second, the Department is overwhelmingly composed of white males. (Jones, V. 24, 4099.) Third, the people that the supervisors know are predominately white males. Dep. Chief Jones explains:

> In some areas of the department, let's take Canine for example, which has been White male, I don't know that I would say there's been any effort to keep it White male, but people tend to -- if they are allowed to have input as to who comes in, they probably pick who they know, and in a department with so many White males, people they know can be White males.

(Jones, V. 24, 4099.)

281. Without a formal Departmental policy concerning the posting and filling of job openings, MPD supervisors have been able to fill positions with officers that they personally want to see in the positions, not necessarily with officers who are most qualified, best suited, or most interested. Some MPD supervisors have acted on their prejudices against women and minorities to exclude them from consideration. Katherine Smulski was a victim of these practices in her efforts to be promoted to the Weapons position.

282. Supervisors are able to use the ambiguous phrase "departmental need" as a rationale for assignments and transfers. Supervisors and administrators in the Minneapolis Police Department engage in a practice of targeting individual officers for career advancement and then make efforts to facilitate the officer's careers that they do not make for all officers.

H. Notice of Gender Discrimination.

283. In April of 1989, Alisa Clemons wrote a letter to Insp. Jones complaining of the disparate and differential treatment she was receiving from her Fourth Precinct supervisors. (Clemons, V. 6, 1167.) Jones responded to her complaints by scheduling a meeting at which Clemons brought to Jones' attention the serious concerns she had about the discriminatory treatment she was receiving from her supervisors. During the same period of time, Clemons also met with Chief Laux to voice her complaints and Laux did recall that she raised issues of gender discrimination. (Laux, V. 20, 3433.) Laux admitted that Clemons had, indeed, complained to him about being differentially treated and being "picked on" by her supervisors. (Laux, V. 18, 3122.) After Jones sent Clemons to David Franzen for psychological assessment in late April of 1989, Franzen wrote a letter to Insp. Otto in October of 1989 to relay the conclusions he had made about Officer Clemons based on his assessment of her. Franzen notified Insp. Otto that he found she was suffering from institutional harassment. (Ex. 52.)

284. By the end of 1989, Insp. Jones, Insp. Otto, and Chief Laux had all been informed of Alisa Clemons' complaints, thereby putting the Department on notice of the gender discrimination and harassment that was being carried out by the Fourth Precinct C shift supervisors during that year.

285. On November 1, 1989, Officer Mary Ketzner filed a formal charge of discrimination against the Minneapolis Police Department. (Ketzner, V. 6, 1104.) Her complaint charged the Police Department with gender discrimination in desk duty, performance evaluation scores, and permanent Squad assignments. (Ex. 87, 1-2.) The Minnesota Department of Human Rights found that the evidence in the case was sufficient to show that (1) Mary Ketzner was subjected to discrimination and reprisal; (2) less senior officers received preferential treatment with respect to assignments over female officers; (3) but for Mary Ketzner's gender and her complaints of discrimination, she would not have been treated differently than similarly situated officers; (4) Mary Ketzner's complaints of discrimination were not taken seriously by the MPD; and (5) Mary Ketzner's gender and complaints were a discernible, causative and discriminatory factor in the MPD's actions. (Ex. 88, 6-7.) Based on the evidence, the MDHR found probable cause to believe discrimination and reprisal had occurred in Ketzner's case. (Ex. 88, 7.)

286. Chief of Police John Laux also admitted to being aware that Officer Ketzner had filed a charge of discrimination with the Department of Human Rights. (Laux, V. 20, 3393.) Laux actually received a copy of the notice of complaint and the charge. (Laux, V. 20, 3393.) Chief Laux also received a copy of the Department of Human Right's findings in the case. (Laux, V. 20, 3394.) While MDHR's determinations are not decisive as to the truth of Ketzner's allegations, Laux was, at the very least, on notice that an independent state agency had made an objective determination that there was probable cause to believe Ketzner's charges were true. Laux admitted that he was not surprised by the MDHR findings, and that they indicated a situation that needed to be dealt with. (Laux, V. 20, 3403.)

287. In November of 1989, at the same time Clemons, Ketzner, and Katherine Smulski were complaining of discrimination in various aspects of the MPD, including performance evaluations, Chief Laux ordered Deputy Chief Faul to conduct a study on the subject of female performance evaluations. (Ex. 92.) In the memo containing his directive, Laux apparently makes note of the fact that there were a rising number of women challenging the evaluations on the grounds of gender discrimination. (Id.) Chief Laux was on notice of the complaints and charges of discrimination. According to Pam French, Dep. Chief Faul sent the memo to the personnel department to complete, as Personnel had all the information necessary to conduct the study. (French, V. 26, 4470.)

288. Pam French compiled the results of the evaluation study and sent them to both Dep. Chief Faul and Chief Laux. The results indicated a significant Department-wide difference between the scores female officers received on performance evaluations versus the scores given to male officers. Pam French began her report by

stating that there were a "couple very obvious discrepancies," including an average 5.3 point difference in the scores for men versus women in the Fourth Precinct. (Ex. 90.) French's memo also states that, "Overall in the whole department male staff scores higher . . ." and the study results indicate a full 3.6 point difference between the average male score and the average female score. (Id.) The Second Precinct showed an 18.6-point differential between male and female scores. (Id.)

289. Chief Laux received French's memo and acknowledged the disparity in the scores between male and female officers; however, he attributed the difference at trial in great part to the fact that female officers generally had a shorter length of service than male officers. (Laux, V. 20, 3476-77.) However, Pam French was not instructed to go back and re-compute the study to account for the difference in the length of service. (French, V. 26, 4484.)

290. The study reflects a measurable and significant difference in the performance evaluation scores between men and women, a difference that tends to support Alisa Clemons, Mary Ketzner and Katherine Smulski's complaints that supervisors used the evaluations as tools for gender discrimination. The study's results put Laux on notice that there was a statistical difference between the way male and female officers were being evaluated in the MPD during 1989.

291. Chief Laux admitted that during his six years as the Chief of Police, he was aware of at least thirty findings of probable cause by the Department of Human Rights concerning discrimination at the Minneapolis Police Department. (Laux, V. 20, 3504.) Chief Laux would see an average of six to ten discrimination complaints against the MPD by the MDHR, with over 90 percent of those charges coming from the MDHR with a finding of probable cause, each year. (Laux, V. 20, 3504.)

292. From the volume of formal discrimination complaints that had been returned with findings of probable cause, Laux was or reasonably should have been on notice that there was a serious problem with discrimination on the police force.

293. The fact that Chief Laux was aware of gender discrimination concerns is also evident from his creation sometime in 1988 or 1989 of the Department's Women's Issues Committee. The purpose of the Committee was to address female officers' concerns, including gender discrimination and sexual harassment problems. This record does not identify if any positive results were achieved by the Committee. However, the very creation of the Committee establishes that Chief Laux was at least aware that issues related to gender discrimination were a serious problem which exists on the MPD.

294. During the period of 1989-90, the Minneapolis Police Department was aware, through formal complaints, MDHR determinations of probable cause, supervisory meetings with complaining officers, at least one written memorandum from David Franzen, and a study requested by the Chief of Police himself, that specific

supervisors on the Fourth Precinct were discriminating against female officers on the basis of their gender.

295. During the period of January 1989 - December 1994, the Minneapolis Police Department was aware, through formal complaints and supervisory meetings with complaining officers, that there was a general problem of gender discrimination on the force.

296. Not only has the Department been made aware of gender discrimination on the force by officers and sources from within the MPD, but outside sources have also put the Department on notice of gender discrimination within the ranks. The issue of gender discrimination on the force was brought to the attention of the entire Minneapolis-St. Paul metropolitan area when articles addressing the subject were published by the Minneapolis Star-Tribune (Tribune) newspaper.

297. In late 1986, the Tribune published a front-page article which addressed prejudice and gender discrimination faced by female officers. (Ex. 76.) Then-Chief Tony Bouza admitted in the article that many female officers were victims of bias by their male supervisors and that the difference in performance evaluation scores between male and female officers was due to the fact that the performance evaluation form did not sufficiently address the policing-style differences between male and female officers. (Id.) Insp. Chris Morris also commented for the article, admitting that she was subjected to prejudice. (Id.) For the instant matter, the significance of the articles is the fact that Insp. Morris and Chief Laux, who recalls being aware of the article's publication and of the contents of the article, (Laux, V. 20, 3424), have been on notice since 1986 that there are problems of gender discrimination within the Department.

298. On July 30, 1994, the Tribune published an article reporting that the Minneapolis Police Department had settled a federal discrimination suit that had been filed by Mary Ketzner in 1993 for $86,000. (Ex. 91.) In the article, Laux admits that the Ketzner case was settled because "it was the right thing to do in the environment that many women officers were working in the 1980's and maybe into the early 1990's." (Id.) Laux admits that the environment for women on the force during that time period "was not the best." (Id.) Laux's comments make it clear that he recognized the problems of gender discrimination and sexual harassment that were occurring on the police department during the exact time period of which Katherine Smulski complains.

299. Minneapolis Police Department officials have been on notice of gender discrimination complaints within the Department. Despite this knowledge the MPD has failed to take effective and corrective action. As a result, female officers continue to be adversely affected by the MPD's failure to address the legacy of its institutional exclusion of women.

I. Monetary Damages

300. As a result of the treatment they were receiving and the failure of the MPD to address their concerns, Donald and Katherine Smulski initiated a human rights complaint. To aid them, they retained the services of the law firm of Corwin & Associates. (K. Smulski, V. 3, 551.) The legal fees incurred as a result of Corwin & Associates' representation of Donald and Katherine Smulski in this matter equaled approximately $6,000. (K. Smulski, V. 3, 552.)

301. As discussed above, Katherine was not hired by the Burnsville Police Department as a direct result of the information given to the background investigator by the MPD. Ex. 10 lays out the differences in the Burnsville Police Department pay scale and the MPD pay scale for an officer of Katherine Smulski's credentials. Using Ex. 10, and only computing the years until Katherine achieved the rank of Sergeant at the MPD, Donald Smulski computed the difference between the two wages. (D. Smulski, V. 5, 953-54.) As Donald explained:

> Kathy has a four-year degree, which would give her 180 credits. Because Burnsville has five different tiers as far as starting salaries based upon no college credits versus a four-year degree, in Kathy's case she has a four-year degree, so in 1990 her start would have been on the far right corner, which would have been 2,272 biweekly (sic). And then Kathy being in the third year -- or third step in Minneapolis, in 1990 it would have been 1,043. *** So I'm subtracting the difference, is how I came up with it; and that's what I did in the continuing years up to '94, when Kathy made sergeant. So then they didn't have a sergeant's thing, so I left it at that when she made sergeant. So it would have been the first four years.

(D. Smulski, V. 5, 954, referring to Ex. 10.) Using those figures, Donald Smulski conservatively estimated the difference to be "like 15,800, almost -- close to 16,000." (D. Smulski, V. 5, 955.) That figure however, does not reflect additional travel costs. Kathy was residing in Burnsville during the relevant time period and having to commute to Minneapolis resulted in an increase in travel expenses. (D. Smulski, V. 5, 955.)

302. As discussed above, Katherine Smulski in November 1990 was unable to return to the hostile environment of the Fourth Precinct C shift. While Katherine in fact used 22 days of sick time in November of 1990, Donald conservatively chose to use 20 days when computing lost sick time. (D. Smulski, V. 5, 963, Ex. 1A.) He explained the basis for his calculations in the following manner:

> The Police Department has it set up that if you receive a certain amount of hours of accumulated sick time, you can cash that in for money, so many hours at 50 percent rate of pay; so many hours at 75 percent; and so many hours, I think it's 900, at 100 percent rate of pay. *** So I based it on -- if she had saved it at a cumulative rate, there would have been 100 percent of pay at a sergeant's

> rate. And at the end of retirement you are able to cash in your sick hours for a rate of pay.

(D. Smulski, V. 5, 964.) Using this methodology, Donald Smulski calculated the value of the amount of sick time Katherine Smulski expended in November 1990 as being worth $2,233.00.

303. As Katherine Smulski testified, she originally planned to take the Sergeant's exam in September of 1990. (K. Smulski, V. 3, 511-12.) However, due to her fears that the promotability index, which would have required her past supervisors to rate her on a promotability factor, would be used on the exam, she waited until September of 1992 to take and pass the exam. (K. Smulski, V. 3, 512.) While the record contains no definite numbers reflecting the amount of wages lost during this period, the difference between an officer's wage and a sergeant's wage for that two year period may serve as a reasonable estimation. Documentation for this calculation is to be submitted pursuant to paragraph 1 of the Order below.

304. Katherine Smulski experienced mental anguish and suffering as a result of the discrimination and reprisal against her during 1989 and 1990. Katherine Smulski was emotionally troubled by the discrimination and adverse treatment she was experiencing at work. First, Katherine suffered a wide range of disturbing emotions. She experienced frustration, anger and sadness. (K. Smulski, V. 3, 543-44.) She felt demoralized. (Ex. 10, 4.) She became depressed watching other officers being given opportunities to do things in the Department that she was not given the opportunity to do. She experienced feelings of depression, sadness, anger and frustration with great frequency, nearly every night from October 1989 through November 1990. (K. Smulski, V. 3, 544.) Even today, when Katherine Smulski thinks about the treatment she received at the Minneapolis Police Department during the periods from 1989 through 1990 and from 1993 through 1994, she re-experiences the sadness, frustration, and anger of that time. (K. Smulski, V. 3, 545.)

305. Second, the discriminatory treatment she faced lowered her self-esteem; she began to doubt her abilities as a police officer, a potentially dangerous thing in an occupation where confidence and command are essential. (K. Smulski, V. 3, 542.) These feelings improved over time, but only after she left the Fourth Precinct in late 1990. (K. Smulski, V. 3, 542.)

306. Third, Katherine Smulski had frequent crying episodes. Starting in October 1989, Katherine Smulski would cry frequently on the way home from work and would cry at home when she would let herself think about what was happening at work. (K. Smulski, V. 3, 541-42.) These crying episodes continued with frequency until November of 1990, when they lessened significantly. (K. Smulski, V. 3, 543.)

307. Fourth, her emotional suffering affected her relationship with Donald Smulski. Donald and Katherine Smulski had trouble opening up to one another. (K. Smulski, V. 3, 547.) Katherine Smulski noticed that around the period of October

and November 1990 the tone of her and Donald Smulski's fights changed and there began to be much more name calling and much less open discussion, listening and sharing of viewpoints. (K. Smulski, V. 3, 547-48.) When they did talk, they could not avoid discussions of the problems they were both facing at the Fourth Precinct; they talked about it every night. (K. Smulski, V. 3, 550.) The problems at the Fourth Precinct also caused both Donald Smulski and Katherine Smulski to take their anger, frustration and stress out on one another. (K. Smulski, V. 3, 550.)

308. Fifth, the experiences Katherine Smulski suffered at the Minneapolis Police Department from 1989 through 1990 permanently affected her mental condition and attitude toward policing. She does not trust her supervisors as much as she once did. (K. Smulski, V. 3, 548.) As a result, she is not open with her supervisors for fear of reprisals. (K. Smulski, V. 3, 548.) Finally, Katherine Smulski no longer socializes with other police officers as she used to do because such gatherings inevitably include discussions of supervisors and the Department, which are just too emotionally difficult. (K. Smulski, V. 3, 548.)

309. The emotional anguish of Katherine Smulski was so severe that it manifested itself in the form of physical symptoms and illness. Katherine described these ailments. For instance:

> In October of 1989 through 1990, I noticed, the days that I had to go to work, that I would have a bout of diarrhea prior to going to work, and then once I got to the station before roll call I would have another bout.

(K. Smulski, V. 3, 533.) Katherine also stated that her stomach constantly felt queasy. (Id.) In November of 1990, as Katherine reached her breaking point, as her physical symptoms increased in severity. She developed a visible rash on her body and suffered from severe headaches. (Id.)

310. In November of 1990 Katherine Smulski obtained medical treatment for these physical symptoms from Dr. Koch. (K. Smulski, V. 3, 540.) Dr. Koch prescribed medication for Katherine's stress-related rashes. (Id.) The same month Katherine visited Dr. Koch, she sought the treatment of therapist Marc Schiappacasse. Schiappacasse believes the information Katherine Smulski gave to him was accurate because of her desire to obtain relief. (Schiappacasse, V. 5, 1003.) In his report, Schiappacasse corroborates Katherine's testimony. He mentions that Katherine told him she had seen a doctor about the rash. (Ex. 36, 1.) He notes also that he suspected that "the rash is [an] anxiety reaction." (Ex. 36, 1.) The report further notes that when Katherine Smulski "goes to work she will feel physically ill, having stomach cramps and diarrhea, especially at morning time when she is around the supervisors that have been doing the harassing." (Ex. 36, 2.)

311. These physical symptoms are manifestations of the emotional distress Katherine Smulski was experiencing as a result of the discrimination at the MPD.

Schiappacasse writes in his report: "In essence Kathy has been experiencing stress reaction to her harassment at work that has been going on since October 1989." (Ex. 36, 2.) Schiappacasse stated that Katherine Smulski's symptoms are typical of patients suffering workplace stress, harassment or discrimination. (Schiappacasse, V. 5, 1001-02.) When questioned about his report he affirmed that his "hypothesis was that Kathy was suffering from stress at work." (Schiappacasse, V. 5, 1007.) Even Dr. Loring McAllister, the city-contracted psychologist whom the MPD required Katherine Smulski to see, stated the following in the Conclusions and Recommendations portion of his report:

> In any event, it is obvious that she feels treated unfairly and discriminated against, and that she has, as a result, developed stress related symptoms which may have interfered with her ability to do her job effectively . . . I am confident that her stress related symptoms involving frustration, anger and *concomitant physical symptoms* have likely been of sufficient severity to interfere with her ability to perform her duties effectively.

(Ex. 10, 7) (emphasis added.)

312. Although most of Katherine's emotional suffering abated toward the end of 1990, she suffered the same emotional symptoms when she experienced discrimination in not obtaining the weapons positions in 1993 and 1994. She became angry, frustrated and sad again when she learned that she was not selected for any of the Department's Weapons Positions. (K. Smulski, V. 3, 545.)

313. Donald Smulski experienced many of the same emotional reactions to the discriminatory and retaliatory treatment he received at the Fourth Precinct as Katherine Smulski did. He also experienced a range of negative emotions as a result of the unfair treatment. These emotions included feeling belittled (D. Smulski, V. 4, 738), demeaned, (D. Smulski, V. 4, 759-60, 62) frustrated and angry (D. Smulski, V. 4, 824). Donald Smulski also felt afraid of what adverse employment action or discriminatory conduct his supervisors would take against him next. (D. Smulski, V. 4, 825.) With his life's career and livelihood on the line, Donald Smulski feared his supervisor's next act of discrimination or reprisal even more than he feared the criminals he encountered on the street. (D. Smulski, V. 4, 824-25.)

314. But the experiences Donald Smulski had on the Fourth Precinct had a profound effect on many areas of Donald Smulski's life. Like Katherine Smulski, Donald Smulski had been hurt and upset by the treatment he received from his Fourth Precinct commanders. The unfair treatment profoundly changed Donald Smulski's relationship with his supervisors. (D. Smulski, V. 5, 827.) Specifically regarding Lt. Winslow, Sgt. Diaz, Sgt. Violette and Sgt. Raiche, Donald Smulski felt that he could not talk openly to them or trust them anymore. (D. Smulski, V. 5, 828.)

315. Another area of Donald Smulski's life that changed for the worse was his relationships with his fellow officers. The unfair treatment he received at the Fourth Precinct in 1989 and 1990 had direct and significant effects on Donald Smulski's relationships with his peers. (D. Smulski, V. 4, 828.) In the beginning, Donald Smulski was frustrated and a little resentful at not receiving recognition for his seniority while the other officers on the shift were. (D. Smulski, V. 4, 824.) When Donald Smulski was excluded from selecting his Squad and partners in 1989, he felt extremely demeaned to be assigned as the third officer in a car behind an officer of lessor seniority. (D. Smulski, V. 4, 759-60.) Donald Smulski also felt demeaned in 1990 at having to "tramp" and move around to other cars and not get his own permanent cars like officers with less seniority had. (D. Smulski, V. 4, 759-760, 762.) Additionally, Donald Smulski, who once enjoyed socializing and talking with other officers on MPD, reached the point that he did not want to talk to fellow officers because of the work-related gossip and the discussion of the discriminatory treatment they had experienced. (D. Smulski, V. 4, 828.)

316. Donald Smulski suffered during 1989 and 1990 by having to watch the emotional suffering his wife endured and seeing the impact that the discriminatory and retaliatory events were having on their relationship. The unfair treatment to which Donald Smulski was subjected had a profound effect on his relationship with Katherine Smulski. (D. Smulski, V. 4, 826.) Donald and Katherine Smulski were Squad partners and friends long before they began dating. They had a strong and complimentary relationship, with many common interests and goals. When Donald Smulski would see the way Katherine Smulski was being treated at work and the emotional and physical pain she was in, it angered him. (D. Smulski, V. 4, 824.) When Donald and Katherine Smulski would go home for the day, Katherine would start to cry, which made Donald even more upset and angry about the situation. (D. Smulski, V. 4, 824.) Katherine and Donald's emotional and professional concerns consumed every conversation they had. (D. Smulski, V. 4, 826.) Donald Smulski was, as a direct result of this, less interested in talking to Katherine Smulski because the conversation always returned back to the intolerable situation at work. (D. Smulski, V. 4, 826.)

317. Donald Smulski was also upset at the way the events at work spilled over into his personal time with his wife. Because of the tense situation at work, the Smulskis often found themselves arguing over little things. (D. Smulski, V. 4, 826.) Eventually, Donald and Katherine Smulski felt compelled to see a therapist.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority to consider the issues raised by the Commissioner's discrimination charges under Minn. Stat. §§ 14.50 and 363.071 (1994).

2. The Notice of and Order for Hearing was proper as to form, content and execution, and all other relevant substantive and procedural requirements of law or rule have been satisfied.

3. Respondent City of Minneapolis Police Department is an employer as defined by Minn. Stat. § 363.01, subd. 17 (1994), and Katherine Smulski and Donald Smulski are "employees" within the meaning of Minn. Stat. § 363.01, subd. 16 (1994).

4. The Minnesota Human Rights Act prohibits covered employers from discriminating against an employee with respect to terms, conditions or privileges of employment because of sex or marital status. Minn. Stat. § 363.03, subd. 1(2).

5. Under Minn. Stat. § 363.03, subd. 7, it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person who opposes unfair discriminatory practices.

6. The Commissioner has the burden of proof to establish by a preponderance of the evidence that Respondent has engaged in unfair discriminatory practices in violation of the Minnesota Human Rights Act.

7. The Minneapolis Police Department discriminated against Donald Smulski and Katherine Smulski on the basis of their marital status, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), by ordering them split up as partners, and assigning them to Able Squads in October 1989.

8. The Minneapolis Police Department discriminated against Donald Smulski and Katherine Smulski on the basis of their marital status, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), by introducing a Squad assignment policy for the Fourth Precinct C Shift in October 1989 that was intended to force the Smulskis to choose between continuing as partners or taking off the same days from work.

9. The Minneapolis Police Department discriminated against Donald Smulski and Katherine Smulski on the basis of their marital status, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), by denying them the opportunity to select their Squads and partners under the new Squad assignment policy.

10. Inspector Jones' threats to Donald and Katherine Smulski in November of 1989 after Donald Smulski had complained to Chief Laux about marital status discrimination constitutes reprisals against Donald and Katherine Smulski in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7.

11. Inspector Jones' threats to Donald and Katherine Smulski in November of 1989 after Donald Smulski had complained to Chief Laux about marital status

discrimination constitutes marital status discrimination against Katherine Smulski in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), in that he was holding her accountable for the actions of Donald Smulski.

12. Inspector Jones' prompting of Sgt. Diaz at a C Shift roll call in November of 1990 to secretly document incidents of bad attitudes by Donald and Katherine Smulski , including negative facial demeanors, constitute marital status discrimination and reprisals against Donald and Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c) and 363.03, subd. 7.

13. The MPD engaged in a pattern and practice of using various administrative tools, including Sergeant Notebook entries, performance evaluations and IAD proceedings, to carry out its threats of reprisals against Donald and Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7.

14. The MPD engaged in a pattern and practice of using various administrative tools, including Sergeant notebook entries, performance evaluations and IAD proceedings to commit sex discrimination and reprisals against female officers including Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c) and 363.03, subd. 7.

15. The supervisors of the MPD's Fourth Precinct engaged in sex discrimination and reprisals against female police officers, including Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c) and 363.03, subd. 7, by improperly using performance evaluations to force them off the shift.

16. The MPD engaged in reprisal against Donald Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7, in the initiation and disposition of IAD Case No. 89-260, concerning the unauthorized use of the MDT.

17. The MPD discriminated against Katherine Smulski on the basis of her sex, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), by providing the Burnsville Police Department with discriminatory information concerning her.

18. The MPD engaged in reprisals against Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7, after she complained about unfair, discriminatory treatment by providing the Burnsville Police Department with false and defamatory information regarding her.

19. The MPD engaged in reprisals against Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7, after she complained about unfair, discriminatory treatment by informing the Burnsville Police Department that she had complained of unfair treatment.

20. The MPD discriminated against Katherine Smulski on the basis of her marital status, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c), by providing the Burnsville Police Department with negative information concerning Donald Smulski.

21. The aforementioned sex and marital status discrimination and reprisals committed by the MPD during the Burnsville Police Department's background investigation of Katherine Smulski was the direct and proximate cause of the Burnsville Police Department's refusal to hire Katherine Smulski.

22. In March 1990, Lt. Winslow subjected Donald and Katherine Smulski to reprisals in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7, when he threatened to use small violations to build a case against them and take away their badges.

23. The low and failing performance evaluation scores given to Donald and Katherine Smulski for the reporting periods of January 1989 through September 1989, and of October 1989 through December 1989, unlawful retaliation against Donald and Katherine Smulski, and sex discrimination against Katherine Smulski, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7.

24. Katherine Smulski was discriminated against on the basis of sex when her complaints of discriminatory treatment set forth in IAD 90-163 were ignored by the MPD, in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c).

25. Sgt. Raiche's assignment of two days of extra desk duty to Katherine Smulski in November of 1990 constituted sex discrimination and reprisal in violation of Minnesota Human Rights Act, Minn. Stat. §§ 363.03, subd. 1(2)(c) and 363.03, subd. 7.

26. Sgt. Raiche's assignment of two days of extra desk duty to Katherine Smulski in November of 1990 because he felt "hornswoggled" by Donald Smulski, constitutes marital status discrimination in violation of Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 1(2)(c).

27. The MPD engaged in reprisals and marital status discrimination against Donald and Katherine Smulski in 1990 with regard to Squad assignments, by continually assigning them to tramp positions, in violation of Minnesota Human Rights Act, Minn. Stat. §§ 363.03, subd.1(2)(c) and 363.03, subd. 7.

28. The MPD discriminated against Katherine Smulski on the basis of sex, in violation of Minn. Stat. § 363.03, subd. 1(2)(c), by denying her a position in the MPD's weapons unit in May 1994 and also by denying her subsequent weapons unit positions that also became available.

29. The MPD has allowed an intimidating, hostile, and offensive work environment to exist and persist at the MPD, which has had an adverse effect on MPD female personnel, including Katherine Smulski, on the basis of sex, in violation of Minn. Stat. § 363.03, subd. 1(2)(c).

30. The MPD has discriminated against Katherine Smulski and other female officers on the basis of sex by allowing the continuation of the effects of historical female exclusion as manifest in substantially "male only" work assignments, use of sexually derogatory and vulgar language, and failure to adequately consider complaints of sex discrimination.

31. By failing to reverse the legacy of its previous female exclusionary policy, the MPD has allowed a continuation of the effects of that policy which has resulted in conditions of employment imposed on female officers that are not similarly imposed on male officers in violation of §363.03, subd. 1(2)(c).

32. Minn. Stat. § 363.071, subd. 2 (1994), permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. Katherine and Donald Smulski are entitled to a treble compensatory damage award of $72,699 (3 x $24,233 ($6,000 + $16,000 + $2,233)). This amount includes compensation for $6,000 in legal fees paid by Donald and Katherine Smulski to Corwin & Associates to initiate their human rights complaint, $16,000 in back pay for the time that Katherine Smulski would have been working as an officer for the Burnsville Police Office, and $2,233 in compensation for Katherine Smulski's lost sick time in November of 1990.

33. Katherine Smulski is also entitled to treble compensatory damages for the greater expenses that she has had to pay because the MPD subverted her opportunity for employment with the Burnsville Police Department, and also for the difference between the officer's wages she received and the sergeant's wages she would have earned had she taken the sergeant's exam two years earlier.

34. Under Minn. Stat. § 363.071, subd. 2 (1994), victims of discrimination are entitled to compensation for mental anguish and suffering from discriminatory practices. Katherine Smulski is entitled to an award of $200,000 to compensate her for the severe mental anguish she suffered as a result of the discriminatory treatment and reprisals that she was subjected to at the MPD. Donald Smulski is entitled to an award of $25,000 to compensate him for the severe mental anguish he suffered as a result of the discriminatory treatment and reprisals that he was subjected to at the MPD.

35. Under Minn. Stat. § 363.071, subd. 2, and the standards set forth in Minn. Stat. § 549.20 (1994), punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts show a deliberate disregard for the rights or safety of others. Punitive damage awards of $8,500 to Katherine Smulski and $8,500 to Donald Smulski are appropriate in this case.

36. Minn. Stat. § 363.071, subd. 2 requires a civil penalty award to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, Respondent should pay a civil penalty to the State in the amount of $1,500,000.

37. Minn. Stat. § 363.071 authorizes the Administrative Law Judge to order Respondent to pay reasonable attorney's fees. Attorney's fees will be awarded in this case upon submission of the fees and costs incurred by Complainant's attorney.

38. Minn. Stat. § 363.071, subd. 7 requires the award of litigation and hearing costs incurred by the Department of Human Rights unless payment of the costs would impose a financial hardship on Respondent. Respondent shall pay hearing and litigation costs incurred by the Department of Human Rights which was $70,505.05 at the end of September, this amount will be updated by the Department of Human Rights. Unless Respondent can demonstrate financial hardship, Respondent shall pay the updated amount.

39. Significant affirmative relief is appropriate in order to stem, deter, and eliminate the effects of historical female exclusion from the MPD workforce and prevent the further occurrence of the discriminatory and retaliatory practices described herein.

40. The Judge has placed several conclusions within the context of the Findings, and insofar as it is necessary, those Findings are hereby adopted as Conclusions. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

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ORDER

IT IS HEREBY ORDERED THAT:

1. This Order is not a Final Decision. A Final Decision in this case will be issued after a determination has been made regarding additional financial damage issues, including hearing and litigation costs incurred by the Minnesota Department of Human Rights, and Katherine Smulski’s additional travel expenses and lost sergeant’s wage computation.

(a) Within thirty (30) days of the date of this Order, Complainant shall file with the Administrative Law Judge and serve on the Respondent a Petition and supporting affidavit(s) and other documentation, if any, that would support a financial recovery of each of the items identified in Ordering paragraph 1. Any request for attorney's fees must be sufficient to allow the Judge to make findings consistent with the

legal principles developed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Complainant shall udate hearing and litigation costs incurred by the Department of Human Rights by from Office of Administrative Hearings charges.

(b) Respondent may also file a Petition with supporting affidavits and other documentation, if any, regarding financial hardship connected with paying hearing and litigation costs incurred by the Department. Respondent shall file the Petition with the Administrative Law Judge and serve it on the Complainant within 30 days of the date of this Order.

(c) Within twenty (20) days of receipt of the Petitions, Complainant and Respondent shall file with the Administrative Law Judge and serve on each other their response, if any. The Judge will take such additional argument and/or evidence as is deemed appropriate at a hearing scheduled for January 9, 1998. After the hearing, the Judge will issue a Final Order setting the final amount of damages to be paid by the Respondent.

2. Respondent shall pay Katherine Smulski and Donald Smulski treble compensatory damages in the amount of $72,699.00 ($24,233 x 3).

3. Respondent shall also pay to Katherine Smulski treble compensatory damages for additional travel expenses and lost sergeant's wages.

4. Respondent shall pay Katherine Smulski $200,000 in damages for her mental anguish and suffering. Respondent shall pay Donald Smulski $25,000 for his mental anguish and suffering.

5. Respondent shall pay $8,500 in punitive damages to Katherine Smulski. Respondent shall pay $8,500 in punitive damages to Donald Smulski.

6. Respondent shall pay a civil penalty of $1,500,000 to the General Revenue Fund of the State of Minnesota or it shall use this money to accomplish the Affirmative Relief required by this Order.

7. All payments to be made hereunder except for the payments stated in Paragraph 2 shall be made within thirty (30) days of the date of the Final Order.

8. Respondent shall make the following changes to its files and records concerning Donald and Katherine Smulski:

a. Respondent shall purge from its personnel, station, IAD and other files all records, data, references documentation and related documents concerning IAD Investigation 89-260, including Chief Laux's referral of Donald Smulski to psychological evaluation.

b. Respondent shall purge from its personnel, station, IAD and other files all records, data, references documentation and related documents concerning all referrals of Donald and Katherine Smulski to psychological evaluations.

c. Respondent shall purge from its personnel, station, IAD and other files all records, data, references documentation and related documents concerning all Sergeant's Notebook entries regarding Katherine and Donald Smulski.

d. Respondent shall purge from its personnel, station, IAD and other files all records, data, references documentation and related documents concerning all performance evaluations concerning Katherine and Donald Smulski for the reporting period of 1/1/89 - 9/30/89 and 10/01/89 - 12/31/89. New performance evaluations will be substituted with new evaluations scored by averaging each officer's performance evaluation scores 1) received on the evaluation immediately prior to the 1/1/89 - 9/30/89 evaluations and 2) the first evaluation each officer received after leaving the Fourth Precinct.

e. Respondent shall purge from its personnel, station, IAD and other files all records, data, references documentation and related documents concerning all adverse interoffice memos and any other writings regarding Katherine and Donald Smulski, authored by or addressed to then-Inspector Jones, Lt. Winslow, Chief Laux, Sgt. Diaz, Sgt. Raiche, Sgt. Violette, Sgt. Larson, and/or Sgt. Dallman.

9. Respondent shall cease and desist from any further sex discrimination, sexual harassment, marital status discrimination, and reprisals as found herein. The Office of Administrative Hearings shall retain jurisdiction over this matter and the Administrative Law Judge shall oversee Respondent's compliance with the following affirmative relief:

a. Within 45 days of the date of the Final Order, Respondent shall serve upon Complainant's attorney, and file with the Administrative Law Judge for his approval, a letter from Respondent to the Chief of Police of the Burnsville Police Department advising him or her that the information provided to the Burnsville Police Department regarding Katherine (Berg) Smulski and Donald Smulski during its background investigation of Katherine (Berg) Smulski was inaccurate, unjustified, discriminatory, and retaliatory in nature. The letter shall also describe Katherine (Berg) Smulski's positive police performance, which shall include but not necessarily be limited to, a statement to the effect that Katherine (Berg) Smulski has performed her duties as a police officer in a skilled, effective and dedicated manner. Complainant shall have 15 days from the receipt of the letter to serve and file comments. Thereafter, the Administrative Law Judge shall either approve the letter or direct Respondent to prepare a new draft incorporating specified revisions and re-submit it for approval in which case the same service, filing and approval procedure will apply again. Once the letter is approved, the original shall be sent to the Chief of Police of the Burnsville Police Department. Copies shall be placed in Katherine and Donald Smulski's personnel files.

One copy shall be served upon Complainant's counsel and one copy shall be filed with the Administrative Law Judge along with an affidavit of service.

b. Within 60 days of the date of this decision, Respondent shall serve upon Complainant's attorney and file with the Administrative Law Judge for his approval policies and procedures which shall:

1) establish a fair, consistent and nondiscriminatory method for posting all job vacancies occurring at the MPD and providing fair notice of such vacancies;

2) provide for the development and utilization of objective standards and criteria concerning the qualifications and factors that will determine the evaluation and selection of candidates to fill all job vacancies at the MPD;

3) provide for the filling of all job vacancies from a published list of candidates in a nondiscriminatory, consistent and fair manner;

4) eliminate "Departmental Needs" and like general terms as justifications for personnel decisions, in favor of specific objective reasons or statements concerning specific departmental needs that Respondent is seeking to address through the personnel decision;

5) establish safeguards designed to eliminate the opportunity for using the IAD process as a means for accomplishing illegal discrimination and/or retaliation; and

6) establish or identify an investigatory entity outside of the MPD that will receive, investigate and address concerns of MPD personnel concerning illegal discrimination and/or retaliation.

Complainant shall have 30 days from the receipt of the proposed policies and procedures to serve and file comments. Thereafter, the Administrative Law Judge shall either approve the policies and procedures or direct Respondent to prepare and submit for approval a new draft incorporating specified revisions in which case the same service, filing and approval procedure will apply again. Once the policies and procedures are approved, they shall be adopted, published in Respondent's Policies and Procedures Manual and implemented by Respondent who shall then serve upon Complainant's attorney and file with the Administrative Law Judge an affidavit confirming that such has been accomplished.

c. Subject to the approval of the Administrative Law Judge, Respondent shall hire an outside consultant(s) or consulting firm to proceed within a reasonable period of time to:

1) identify barriers and obstacles to full integration of women into the work force of the Minneapolis Police Department, study the impact of the MPD's previous female exclusionary policy and determine what are the legacies of the previous all-male working environment and what is the MPD doing to continue or reverse the legacies of the previous all-male working environment;

2) study the occurrence of marital status and sex discrimination and retaliation at the MPD, and the nature and extent of the intimidating, hostile and offensive work environment to which female officers and employees of the MPD are being subjected;

3) review the policies and procedures that Respondent currently utilizes to address these issues;

4) make recommendations to Respondent regarding new policies and procedures and/or revisions to existing policies and procedures and/or new or revised methods of implementing existing or revised policies and procedures that will address these issues; and

5) conduct training of all MPD supervisors and officers of the rank of sergeant and above regarding the implementation of the MPD policies, procedures, standards and criteria in a nondiscriminatory and non-retaliatory manner and, thereafter, conduct training of all newly promoted sergeants in these matters;

6) conduct training of all MPD personnel, and thereafter newly hired personnel, designed to raise awareness and sensitivity regarding the rights of MPD personnel to work in an environment that is free of intimidation, hostility and offensive conduct based upon gender, and disseminate information regarding the policies and procedures that should be followed if issues of this nature should arise;

d. Prior to the hiring of said consultant(s) or consulting firm, Respondent shall file with the Administrative Law Judge and serve upon Complainant's attorney the name, address and qualifications of said consultant(s) or consulting firm. Complainant shall have 30 days from the receipt of said information to serve and file comments. Thereafter, the Administrative Law Judge shall either approve the hiring of the proposed consultant(s) or consulting firm or direct Respondent to submit a new proposal in which case this service, filing and approval procedure will apply again. Once the hiring of said consultant(s) or consulting firm has been approved:

1) Respondent shall serve upon Complainant's attorney and file with the Administrative Law Judge an affidavit confirming that the training required above has been accomplished.

2) Respondent shall serve upon Complainant's attorney and file with the Administrative Law Judge copies of all reports, recommendations and supporting documentation within 10 days of receiving such reports, recommendations

and supporting documentation from the consultant(s) or consulting firm. Complainant shall have 15 days from the receipt of such reports, recommendations and supporting documentation to serve and file its comments. Thereafter, the Administrative Law Judge shall acknowledge the receipt of the reports, recommendations and supporting documentation or provide specific notice to Respondent regarding any deficiencies that might exist along with instructions for addressing them, in which case Respondent shall so instruct the consultant(s) or consultant firm and follow the same procedure for serving and filing any revised or supplemental reports, recommendations or supporting documentation.

3) Within 45 days of acknowledgment of receipt of the reports, recommendations and supporting documentation by the Administrative Law Judge, Respondent shall serve upon Complainant's attorney and file with the Administrative Law Judge a proposed plan for implementing the consultant(s) or consulting firm's recommendations. Complainant shall have 20 days from the receipt of such proposed plan to serve and file comments. Thereafter the Administrative Law Judge shall either approve the plan or direct Respondent to serve and file a new proposed plan that contains certain amendments, in which case the same service, filing and approval procedure will apply.

4) For a period of three years following the Administrative Law Judge's approval of Respondent's proposed plan for implementing the consultant(s) or consulting firm's recommendations or until the complete implementation of the plan is acknowledged by the Administrative Law Judge, whichever occurs first, Respondent shall serve on Complainant's counsel and file with the Administrative Law Judge a report every January 15th and July 15th of each year regarding the status of Respondent's efforts to implement the plan. Complainant shall have ten days after receipt of the report to serve and file comments. Upon request from the Administrative Law Judge, Respondent shall serve and file any underlying documentation or data which pertains to Respondent's efforts to implement the plan or the effects of such implementation. Should the Administrative Law Judge, based upon his review of the information described herein, determine that Respondent has failed to engage in reasonable and/or good faith efforts to implement the recommendations of the consultant(s) or consulting firm, he shall notify Respondent of the deficiency and the corrective action that it must take and the time period in which it must be taken. If Respondent should fail to accomplish the corrective action specified, the Administrative Law Judge shall impose appropriate affirmative relief including but not limited to extension of the monitoring and reporting period.

10. On or before January 1, 2000, the MPD shall provide the Judge with an accounting of the monies actually expended in the Affirmative Relief ordered in paragraph 9 above, and supply a copy of the accounting to the Commissioner. Upon review, the Judge shall determine how much, if any, of the $1,500,000 should be paid to the State as a civil penalty.

11. Respondent's request that this be dismissed is hereby DENIED.

Dated this 30th day of October 1997.

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ALLEN E. GILES
Administrative Law Judge

Reported: Shaddix & Associates
Colleen M. Sichko, Registered Professional Reporter
36 Volumes of Transcript

MEMORANDUM

Introduction

The State of Minnesota, by David Beaulieu, Commissioner of Human Rights (hereinafter referred to as the "Commissioner" or "Complainant"), brings this action pursuant to Minn. Stat. § 363.06 on behalf of Donald Smulski and Katherine Smulski. The Commissioner alleges in three separate counts that the City of Minneapolis, through the Minneapolis Police Department (hereinafter also referred to as the "City," "MPD" or "Respondent") has engaged in a pattern and practice of discrimination resulting in unfair discriminatory practices in violation of Minn. Stat. § 363.03.

In the City's Answer to the Complaint, it specifically denies that it has violated any provision of the Minnesota Human Rights Act as alleged by Complainant. The City also alleges numerous affirmative defenses, many of which have not been further discussed or argued by Respondent.

Complainant alleges in Count I of the Complaint that the Minneapolis Police Department, through supervisory personnel and various other employees, has engaged in a pattern and practice of discriminating against Donald Smulski and Katherine Smulski on the basis of marital status, in violation of Minn. Stat. § 363.03, subd. 1(2)(c).

Complainant alleges in Count II of the Complaint that Respondent has discriminated by reprisal against Donald and Katherine Smulski, in violation of Minn. Stat. § 363.03, subd. 7, by retaliating against them for opposing conduct which constituted marital status discrimination and sex discrimination.

Finally, in Count III of the Complaint, Complainant alleges that Respondent has engaged in a pattern and practice of harassing and discriminating against Katherine Smulski and other female officers on the basis of sex, in violation of Minn. Stat. § 363.03, subd. 1(2)(c) and of retaliating against her and other female officers for having

opposed conduct which constituted sex discrimination, in violation of Minn. Stat. § 363.03, subd. 7.

Pursuant to Minn. Stat. § 363.071, subd. 2, Complainant seeks a cease and desist order against Respondent's future discriminatory conduct, substantial affirmative relief, compensatory and punitive damages, damages for Donald Smulski's and Katherine Smulski's mental anguish and suffering, a civil penalty to be paid to the State, attorney's fees and the Department of Human Rights hearing and litigation costs.

Witnesses and Testimony

This case has a large record. There are 36 volumes containing over 6,000 pages of oral testimony. The documentary testimony consists of 125 exhibits also consisting of several thousand pages. There were 36 witnesses whose testimony was spread over a seven-month period from July 15, 1996 to January 9, 1997, a total of 36 days of trial. Despite the size of the record, the Judge has carefully reviewed the oral and documentary testimony, recalled the demeanor and spontaneity of the witnesses and resolved the substantive, relevant conflicts in testimony.

The Judge feels compelled to note that 13 sworn female officers testified at the hearing. This is a significant percentage of the total number of female officers employed by the Minneapolis Police Department (in excess of 10 percent of the total of female officers employed in 1994 which was approximately 105 or 106). The officers were representative of all levels of employment of female officers on the MPD. Their numbers included patrol officers, sergeants, lieutenants, and inspectors.

The MPD called nine of the female officers as its witnesses to rebut the Commissioner's witnesses' testimony regarding sex discrimination and marital status discrimination. The MPD also called former Chief John Laux, whose testimony also addressed the issue of sex discrimination. Although these MPD witnesses were called for the purpose of rebutting the Commissioner's witnesses' testimony, the MPD's witnesses have added breadth and depth to Complainant's claims of the pattern and practice of sex discrimination.

Assessment of Testimony

A. Testimony Relating to Separation

In the first two years on the Minneapolis Police Department, Donald and Katherine Smulski compiled excellent records as police officers. Officers who worked with them observed their ambition and commitment to police work. They described them as exceptional officers. Their supervisors, prior to October 18, 1989, also believed

that they were excellent officers. Donald and Katherine Smulski also knew that they were doing a good job. Ironically, they became victims of their own success. Each successful arrest they made that resulted in the bringing of criminal charges required that they testify in court. Court time removed them from their usual street patrol activities or, at other times, particularly when they were on "Dogwatch Shift" (10:00 p.m.-6:00 a.m.), made for a very long day without sleep. They were working on Dogwatch when the problems arose in October 1989.

Without a doubt, Donald and Katherine Smulski had communications problems and misunderstandings with the County Attorney's Office in October 1989. In addition on the morning of October 18, 1989, they were rude and uncooperative with the County Attorney's Office personnel. Later that morning they went to court. They spent the entire day in court and finally testified in the late afternoon.

Meanwhile, unknown to Donald and Katherine Smulski, discussions were occurring among their superiors that would drastically change their working life as Minneapolis police officers.

On October 12, Inspector Jones received the first telephone call from the Hennepin County Attorney's Office calling attention to Donald and Katherine Smulski's communication problems. However, for some reason, Insp. Jones associated these communications problems with their cohabitation/personal relationship.[16]

Insp. Jones testified that in dealing with the County Attorney's concerns he conferred with Fourth Precinct supervisors. (Jones, V. 23, 3889.) At one point he said that he conferred with "three lieutenants and a couple of sergeants". (Ex. 30, 7.) However, Insp. Jones could not recall when he spoke with them. He provided little information in his testimony regarding the discussions that he had with Fourth Precinct supervisors.[17]

The Judge is reasonably certain that Insp. Jones conferred with Lt. Winslow, who was at this time Shift Commander of the Fourth Precinct C Shift. The Judge believes that this discussion occurred on or about October 12. At some point in the discussions, Lt. Winslow suggested his plan, his "new approach" to squad assignments, to resolve the problem. His "new approach" would force Donald and Katherine Smulski to choose between remaining as partners or taking the same days off of work.

The Judge believes that Lt. Winslow proposed his "new approach" at this time for the following reasons: a) First, it was Winslow's responsibility and authority as Shift Commander to make Squad assignments each month; b) All Squad assignments proposed for any given month had to be approved by Insp. Jones (Jones was the Commander of the Fourth Precinct); c) The Judge believes that although it was within Winslow's authority to make monthly Squad assignments, he would not have made any major change without conferring with Insp. Jones; and d) Winslow wanted to keep these productive and ambitious officers on the C Shift and probably would have opposed sending one of the Officers to another Precinct or Shift.

Based on Lt. Winslow's testimony, the City asserts that the "new approach" to Squad assignments was introduced to address certain C Shift assignment problems. The City also suggests that the proposal was unknown to Insp. Jones. The Judge rejects this alternative assessment of the facts as not credible for these reasons: a) As detailed in the Findings of Fact, the reasons for the "new approach" were never pursued after the month of October 1989, and b) The Judge believes that Lt. Winslow would not have proposed any major change in assignment methodology without conferring with Insp. Jones, the person who reviewed and approved monthly Squad assignments.

On October 16, 1989, Lt. Winslow introduced his "new approach" to Squad assignments to Donald and Katherine Smulski. The Judge has concluded that Lt. Winslow introduced the "new approach" at this time for the purpose of forcing Katherine and Donald Smulski to separate as partners. As detailed in the Findings, the major reasons for Lt. Winslow's "new approach" to squad assignments were not accomplished or even pursued. The most successful result of the new approach to squad assignments appears to be the effect that it had on Donald and Katherine Smulski. They decided to separate as partners because of it.

Under Winslow's plan, Donald and Katherine Smulski would continue to be on the street as patrol officers assigned to a Squad patrolling one of the Fourth Precinct Squad Districts. The events of October 17 and 18 detailed in the Findings of Fact prevented this from happening. The Chief's Office ordered that they go to Assistant County Attorney Steve Redding's office to serve as witnesses and that their partnership be terminated immediately.

As previously stated, without a doubt there were communication problems and misunderstandings between Donald and Katherine Smulski and the County Attorney's office. And without a doubt, Donald and Katherine Smulski were rude and used poor judgment on the morning of October 18, 1989. However, terminating their successful productive partnership because of the communication problems seems draconian. The Judge believes that at least one supervisor at the Fourth Precinct C Shift believed it was downright overkill.

Lt. Winslow believed that he had resolved the problem by forcing Katherine and Donald Smulski to choose other partners. That way he would be able to keep these two energetic and ambitious officers patrolling the streets of the Fourth Precinct. The Judge believes that it was not his intention, at least not initially, to prevent Donald and Katherine Smulski from making their squad and partner selections. If it had been left to Lt. Winslow, they would have selected in the order of their seniority, like other officers. When the Chief's office or Insp. Jones ordered that Katherine and Donald Smulski be placed on Able Squads, Lt. Winslow was very angry. Lt. Winslow was very angry for the following reasons. The order to place Katherine and Donald Smulski on Able Squads interfered with his authority to make monthly squad assignments, forced him to lose the productivity of these two officers and, worst of all, he was ordered to put them on Able Squads.

Lt. Winslow's testimony regarding Able Squads was remarkable and impassioned; essentially, he stated that assigning Able Squads to a squad district would be the last thing that he would ever do and if it were up to him it would never be done. Lt. Winslow stated:

> If it were up to me, there would be no one-person cars on the street. However, I am not the Chief of Police.

(Winslow. V. 28, 4857-60.) Lt. Winslow's passionate discussion of this topic was surprising and memorable.[18] In retrospect, the Judge believes that Lt. Winslow was saying that the matter was not handled the way he thought it should have been handled and he would not have handled it the way it was done.

Lt. Winslow was angry that his authority had been usurped by the Chief's office.[19] He was angry that he was being forced to do something he was opposed to doing. He had no desire to speak to Katherine and Donald Smulski about reasons why they were being assigned Able Squads. Although he was angry, he was a loyal soldier. For about one year, each month, he assigned Katherine and Donald Smulski either to Able Squads or to relief. He did not reverse his decision.

The City has not proposed any assessment of the facts relating to the split-up of Donald and Katherine Smulski and their assignment to Able Squads that has merit. For example, based on Lt. Winslow's testimony, the City proposes that Lt. Winslow assigned them to Able Squads because they had not given him their selections and, therefore, that was the only way he could honor their request to be separated. The Judge rejects this proposed view of the facts. If this had been Lt. Winslow's reason, the Judge believes that Lt. Winslow would have told them this when Donald and Katherine Smulski asked why they were assigned to Able Squads. Yet he did not.

Instead of telling them that he believed that they wanted to be assigned to Able Squads, he informed them that Insp. Jones had ordered that they be placed on Able Squads. Because Donald and Katherine Smulski had already told him their preferences (K. Smulski, V. 1, 90), it would have been difficult for Lt. Winslow to tell them that he did not know what their preferences were. In addition, Donald and Katherine Smulski asked Sgt. Violette to intervene on their behalf to ask Lt. Winslow about the matter. Sgt. Violette also informed Lt. Winslow that there were other officers that they would like to work with. (Ex. 28, 2.) On this issue, Lt. Winslow's testimony is not credible.

The Judge has found that Lt. Winslow was told by Donald and Katherine Smulski what Squads and partners they would prefer. He ignored their requests and assigned them to Able Squads.

B. Connection between Personal Relationship and Working as Partners

The City introduced no evidence that would draw a connection between Katherine and Donald Smulski working as partners and their personal relationship/cohabitation. No effort has been made to show whether their personal relationship affected positively or negatively on their communications problems with the County Attorney's Office or with their attendance at court. No factual evidence was introduced to establish whether or not the personal relationship between Katherine and Donald Smulski had a positive or negative impact on their job. In fact, none of the documentary evidence identifies any association between their personal relationship and their job.[20]

Initially, the Judge believed that the City would put forth witnesses and evidence that showed reasons why the Police Department did not desire to have officers who had a personal relationship working together as partners. However, the City has not taken that position. Instead, the City maintains that it has no policy or practice that prohibits patrol officers in a personal relationship from working together as partners. The City maintains that no action was taken against Donald and Katherine Smulski because of their personal relationship.

C. Inspector Jones' Threat to Make Their Lives Miserable

The record supports the conclusion that Insp. Jones' warning was in retaliation for protected activity. Insp. Jones testified that he recalled a meeting between himself and Donald and Katherine Smulski after "they had gone down to the Chief". (Jones, V. 23, 3954.) He admitted that he was "plenty annoyed" that they had complained to the Chief. (Id.) He admitted that he made a statement to the effect that "if they didn't knock it off, their lives wouldn't be the same". (Id.) This is consistent with Katherine Smulski's testimony that Jones told them he would make their lives miserable if they complained again. (K Smulski, V. 1, 147.)

D. Inspector Jones' Credibility

Insp. Jones maintained that his actions relating to Donald and Katherine Smulski were not in any way motivated by the officers' personal relationship or by a desire to retaliate against them for protected activity. The Judge has not found Insp. Jones to be a credible witness.

During the Linda Lachner trial in 1993, Insp. Jones testified under oath that he believed there was no corrective action he could take against a sergeant under his command who graded female officers lower than men on performance evaluations, even if the sole reason for doing so was the sergeant's belief that women should not be police officers. (Jones, V. 31, 5351-54.) However, the record indicates that Insp. Jones had a good understanding of the requirements of the Minnesota Human Rights Act, having previously sued the City of Minneapolis for what he believed was a Human Rights Act violation. (Jones, V. 24, 4200-01.) Insp. Jones knew that his inquiry into the

personal relationship of Donald and Katherine Smulski in November of 1989 was inappropriate at the time he made it. The Judge does not believe that it is credible that in 1993 Insp. Jones believed he was powerless to address gender discrimination by sergeants under his direct command.

The Judge also notes that in 1993 Insp. Jones shredded what he believed to be the only existing copies of adverse 1989 performance evaluations of Officer Mary Ketzner. These performance evaluations gave her “unacceptable” scores and contained adverse comments written on the back of the forms. (Jones, V. 31, 5343-49.) The evaluations had been signed by Insp. Jones and other Fourth Precinct C Shift supervisors. After Insp. Jones and Fourth Precinct sergeants failed to justify the low scores Chief Laux evaluated Mary Ketzner himself removing the unacceptable scores. The adverse evaluations should never have been placed in Officer Ketzner's files, but they were and remained there for four years.

Insp. Jones shredded the adverse evaluations on the eve of his scheduled testimony in the Lachner trial, a case in which gender bias and performance evaluations in the Fourth Precinct was a primary issue. Insp. Jones was a central witness for the defendant in that case and knew what the case was about before he testified. (Jones, V. 31, 5344.) Insp. Jones claimed in this proceeding that he shredded the documents for Officer Ketzner's benefit, despite the fact that she had specifically requested that the evaluations be mailed to her.

Insp. Jones believed that he was shredding the only remaining copies of the performance evaluations. The Judge believes that Jones knew the potential adverse evidentiary value of the documents he destroyed, and it is incredulous to assert otherwise.

Finally, another incident of incredulous testimony by Insp. Jones relates to the meeting in his office with Donald and Katherine Smulski. Donald and Katherine Smulski testified that at this meeting Insp. Jones threatened to make their lives miserable if they made another complaint. The meeting followed a meeting that Donald Smulski had with Chief Laux. Jones asserts that when he warned the Smulskis to "knock it off", he was not referring to their complaining of unfair treatment to the Chief, but rather to their "bad attitude" as evidenced by misconduct. (Jones, V. 23, 3955.) Inspector Jones' testimony is inconsistent with the context of the meeting where he admits that he was "pretty annoyed" that they had gone to see Chief Laux. Jones' claim that his "warning" was not related to Donald Smulski's meeting with Chief Laux is not credible.

E. Performance Evaluations

The Judge does not desire to second-guess a supervisor's review of the performance of persons being supervised. The Judge viewed the Commissioner's claims in this area with substantial skepticism. Supervisors deserve the benefit of doubt in the exercise of their judgment in relation to performance evaluations. The Judge also

believes that there have to be compelling irregularities before the supervisor's judgment is dissected.

Complainant has persuaded the Judge that this case contains several compelling irregularities. First, Sgt. Banham's statement that as a part of his orientation to the Fourth Precinct C Shift, Sgt. Diaz told him that the supervisors use documentation and performance evaluations to get rid of female officers that the supervisors were having problems with. Sgt. Diaz testified after Sgt. Banham. He did not challenge Sgt. Banham's statement.

Second, Fourth Precinct supervisors were openly hostile toward the evaluation process, and imposed their own standards in disregard to the standards required by the Performance Evaluation User's Manual. The performance evaluation process was variously referred to as "the biggest bunch of crap I have ever seen in my life", and as "so subjective that it doesn't mean anything", and "it's just lousy. I think it's real subjective."

Third, Chief Laux himself at one time had to interpose himself when Fourth Precinct supervisors failed to provide him with documentary detail to support statements contained in Officer Mary Ketzner's evaluation. Even after Chief Laux corrected Ketzner's evaluation and substituted the evaluation he did, the other unsubstantiated evaluations continued to be in her file.

Fourth, Deputy Chief Jones shredded the performance evaluations of Mary Ketzner that Chief Laux believed were unfair. He shredded the documents shortly before he gave testimony in a trial where a principal issue was alleged discrimination with respect to performance evaluation by supervisors in the Fourth Precinct. Insp. Jones knew that the performance evaluations could have had an adverse effect on the litigation He believed that he was shredding the only evidence of the performance evaluations that Chief Laux himself believed was unfair.

Finally, Chief Laux was aware that there were gender discrimination problems in connection with the performance evaluations. In anticipation of the 1989 performance evaluations, he had a study done by the Personnel Department which compared the performance evaluation scores of female officers to male officers for the year 1988. The report confirmed that there were significant discrepancies between female and male officers on the scores in performance evaluations. Chief Laux, however, concluded that the discrepancies were due to female officers not having the same years of experience as male officers.

The Judge believes that the above are compelling reasons for taking a closer look at the performance evaluations done by Fourth Precinct supervisors. Moreover, the above reasons when taken together, cumulatively compel suspicion for any departures from standardized procedures.

F. Retaliatory Culture

The culture of the Minneapolis Police Department dictates that if an officer is dissatisfied with her circumstances or his assignment, she should accept it, and not complain. Persons who did complain were subject to penalty, which could escalate over time. The Judge was introduced to this culture via the spontaneous and voluntary statements of various City witnesses, particularly Capt. William T. Berg, Sgt. Donald Harris and Lt. Valerie F. Wurster. The City did not call these witnesses to give testimony on this issue. Capt. Berg described a situation where reprisal was taken against him because he criticized Chief Laux's disciplining of officers. (Berg, V. 15, 2637-40.) Capt. Berg also gave testimony regarding penalty assignments or "penalty boxes". (Berg, V. 15, 2645.) Sgt. Donald Harris described the desk assignment at the Fourth Precinct C Shift as a "penalty box". (Harris, V. 14, 2466.) He stated: "If you were working the desk, you must have done something to make the sergeants angry." (Id.) The Judge also recalls Lt. Wurster and Capt. Berg's testimony relating to C.J. Irvine, a person that Lt. Wurster considered a "problem employee". Lt. Wurster, in consultation with Capt. Berg, summarily transferred Sgt. Irvine without previously consulting her as to whether she would like to be assigned to the juvenile division. (Berg, V. 15, 2643-49.)

In the context of this retaliatory culture, it is not surprising that the complaints of Donald and Katherine Smulski, as well as Officer Ketzner and Clemons, were met with the retaliatory behavior identified in the Findings.

Legal Analysis: Marital Status Discrimination

Minn. Stat. § 363.03, subd. 1(c) provides as follows:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice:
>
> * * *
>
> (2) for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age
>
> * * *
>
> (c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

The Supreme Court of Minnesota has established a specific order and allocation of proof for analyzing evidence in disparate treatment cases that arise under the Minnesota Human Rights Act (hereinafter “MHRA”). See Dietrich v. Canadian Pacific

Ltd., 536 N.W. 2d 319, 323 (Minn. 1995); Sigurdson v. Isanti County, 386 N.W. 2d 715, 719-720 (Minn. 1986); Hubbard v. United Press International, 330 N.W. 2d 428 (Minn. 1983); Lamb v. Village of Bagley, 310 N.W. 2d 508, 510 (Minn. 1981). In Sigurdson, the court stated:

> First, the plaintiff must present a prima facie case of discrimination by a preponderance of the evidence. This requires the plaintiff to present proof of discriminatory motive. A prima facie case may be established by direct evidence of discriminatory motive, such as where an employer announces he will not consider females for positions. For those cases in which such direct evidence is not available, the Supreme Court, in [McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)] articulated an alternative means by which discriminatory motive can be indirectly inferred.[21] The specific elements of the McDonnell Douglas court's formulation of the plaintiff's prima facie case, however, must be modified for varying factual patterns and employment contexts.[22]
>
> A generalized formulation of the McDonnell Douglas prima facie case applicable to cover the claims presented by this plaintiff would be that: (1) plaintiff is a member of a protected group; (2) plaintiff sought and qualified for opportunities that the employer was making available to others; (3) plaintiff, despite her qualifications, was denied the opportunities; and (4) after plaintiff was denied, the opportunities remained available or were given to other persons with plaintiff's qualifications.
>
> If the plaintiff is successful in establishing a prima facie case, the second step in the McDonnell Douglas analysis creates a presumption that the employer unlawfully discriminated against the employee, and the burden of production shifts to the employer to present evidence of some legitimate, non-discriminatory reason for its actions. At this stage of analysis, the trial court should look for evidence presented by the employer that its actions were related to some legitimate business purpose. The court should evaluate the sufficiency of the employer's evidence by the extent to which the evidence "serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."
>
> If the employer succeeds in carrying its burden of production, the third step of the McDonnell Douglas analysis requires the plaintiff, in order to prevail, to show that the reason or justification stated by the employer is actually a pretext for discrimination. At this stage, the plaintiff has the burden of persuading the court by a

> preponderance of the evidence that the employer intentionally discriminated against [him or her]. The plaintiff may sustain this burden "either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."

Sigurdson, at 720. (Citations omitted.)[23]

Even if an employer is found to have a legitimate non-discriminatory reason for an adverse employment action, it may still be held liable and required to provide full relief, if protected class status is, nonetheless, a discernible and causative factor, i.e., if an illegitimate reason "more likely than not" motivated the adverse action. McGrath v. TCF Bank Savings, 509 N.W.2d 365, 366 (Minn. 1993); Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619, 627 (Minn. 1988).

Complainant has established a prima facie case of marital status discrimination with respect to the separation of Donald and Katherine Smulski as partners in October 1989. To establish a prima facie case, Complainant must establish that:

(a) As police officers in a personal relationship, unmarried and "cohabiting" Donald and Katherine Smulski are in protected class status;

(b) An adverse personnel action against them; and

(c) Similar action was not taken against other patrol officer partners.

Donald and Katherine Smulski's relationship and living arrangement, their "cohabitation", is protected under the Minnesota Human Rights Act. However, Respondent challenges the protected class status of Donald and Katherine Smulski, asserting that "cohabitation" does not constitute a protected status under the MHRA. Respondent mainly relies on Cybyske v. Independent School District No. 196, 347 N.W.2d 256 (Minn. 1984). The Minnesota Legislature, in 1988, rejected the limitations imposed by Cybyske by amending the definition of "marital status" as:

> Whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of identity, situation, actions, or beliefs of a spouse or former spouse.

Minn. Stat. § 363.01, subd. 40 (emphasis added). This amendment effectively overrules the limitations placed on the MHRA under Cybyske.

Instead of Cybyske, a more appropriate comparison are appellate court cases where the issue of unmarried cohabitation was considered. Appellate courts have determined that discrimination due to the "cohabitation" of employees or applicants constitutes an actionable violation of the Minnesota Human Rights Act. State v. Sports

and Health Club, Inc., 370 N.W.2d 844 (Minn. 1985), and State v. Porter Farms, Inc., 382 N.W.2d 543 (Minn. Ct. App. 1986).

Respondent also challenges Complainant's claim that Donald and Katherine Smulski were subject to adverse personnel decisions. The prevailing practice at the Fourth Precinct was to allow officers to select their own partners to the greatest extent possible and there was testimony that working with a compatible partner was essential for effective police work. (Larson, V. 21, 3557-60.) Donald and Katherine Smulski were an effective team. Splitting them up adversely affected their job satisfaction. In addition, they were prohibited from selecting Squads and partners like other officers. They were assigned Able Squads, which was generally a less desirable assignment. Able Squads were less safe and resulted in lower scores on the patrol performance street statistics which resulted in lower performance evaluation scores. Like the plaintiff in Adams v. West Publishing Company Co., 812 F. Supp. 925 (D. Minn. 1993), aff'd, 25 F.3d 635 (8th Cir. 1994), Donald and Katherine Smulski have suffered a "materially adverse change in their terms or conditions of employment." Adams, 812 F. Supp. at 930. For the foregoing reasons, the Judge believes Complainant has established a prima facie case.

Respondent must articulate legitimate nondiscriminatory reasons for Insp. Jones' decision to split up Donald and Katherine Smulski. Insp. Jones testified that he separated them because of the County Attorney's allegations that they ignored subpoenas and failed to stand by for court time. The Judge finds that Insp. Jones' reasons are pretext for discrimination based on the following analysis.

Insp. Jones never questioned Donald and Katherine Smulski about the County Attorney's allegations that they ignored a subpoena to appear in court on October 17, 1989 and that they violated standby for court procedures on October 13, 1989. He initiated an IAD investigation into the matter. Having referred the matter to IAD, Insp. Jones did not wait for the results of that IAD investigation before taking his "corrective action" of ordering the officers split up.

Insp. Jones made no attempt to terminate this IAD investigation after the officers presented him with conclusive evidence that no subpoena for them to appear on October 17 had been received. Insp. Jones' response to this offer of proof was to inquire whether or not it was true that the officers were living together. (Ex. 30, 8.) At trial, Insp. Jones could give no reason for this inquiry. (Jones, V. 23, 3941.)

Finally, Insp. Jones did not rescind his "corrective action" even after the IAD case concluded that Donald and Katherine Smulski had not failed to respond to subpoenas on October 17 and had not violated standby for court procedures on October 13.

The Judge concludes that Complainant has met its burden under step 3 of McDonnell Douglas v. Green, 411 U.S. 792 (1973), by showing that Insp. Jones' proffered nondiscriminatory reason for his order is mere pretext. The Judge also notes

that even if the nondiscriminatory reason is valid, the Judge is convinced that discriminatory motive was a causative factor in Inspector Jones' decision to split up Donald and Katherine Smulski. The Judge is firmly convinced that the protected class status of the officers was a discernible and causative factor motivating the adverse action. McGrath v. TCF Bank Savings, 509 N.W.2d 365, 366 (Minn. 1993); Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619, 627 (Minn. 1988).

The Judge also concludes that the Complainant has established a prima facie violation with respect to Lt. Winslow's "new approach" to the assignment of Squads. The "new approach" forced Donald and Katherine Smulski to separate as partners. Lt. Winslow and Sgt. Diaz testified that the purpose of the "new approach" was to promote officer safety by reducing the use of one-person Able Squads and to ensure that two officers were always present to work the primary Squads. (Diaz, V. 29, 4988-89; Winslow, V. 27, 4650-51.) The record establishes that these "reasons" for the new approach were not pursued. In fact, in the months that followed the introduction of the new approach, the number of Able Squads increased and few, if any, of the Squads followed the new rule that two officers must always be present to work. The fact that the reasons for the "new approach" were never in fact pursued leads the Judge to conclude that there were no legitimate needs for the "new approach" policy. The absence of a legitimate need leads the Judge to conclude that the reasons were pretextual.

The Judge also believes that even if Lt. Winslow's "new approach" is viewed as a "neutral" policy, it nevertheless adversely affects the protected class status of Donald and Katherine Smulski. Employment policies that adversely affect a protected class are presumed to violate the MHRA, absent a showing that the policy is necessary to meet a legitimate need of the business organization. Dietrich v. Canadian Pacific Ltd., 356 N.W.2d 319, 327 (Minn. 1995). The "new approach" had an adverse effect on the protected class of married or cohabiting police officers and Respondent has failed to show that the policy or new approach was necessary to meet any legitimate need of the MPD.

For the foregoing reasons, the Judge has concluded that the "new approach" to squad assignments constitutes an unfair discriminatory practice because it forced Donald and Katherine Smulski to separate as partners.

The Judge has also concluded that the failure to allow Donald and Katherine Smulski to use their seniority to make selections of squad cars and partners is an independent act of marital status discrimination. All officers on the C Shift were allowed to select squad cars and partners based on their seniority. Unlike their co-workers, Donald and Katherine Smulski were not allowed to make their selections of squad cars and partners. The only reason that Respondent asserts for not allowing them to make selections was the claim by Lt. Winslow that he didn't know which selections they preferred. However, this record establishes that Donald and Katherine Smulski provided names of partners they wanted to work with and identified squad districts that they wanted to be assigned to. They also asked Sgt. Violette to speak to Lt. Winslow on

their behalf. Sgt. Violette identified Squads and partners that Donald and Katherine Smulski preferred. Lt. Winslow's testimony that he did not know the preferences of Donald and Katherine Smulski is not credible.

Therefore, by not allowing Donald and Katherine Smulski to exercise their seniority to make selections of squad cars and partners, Respondent has committed an unfair discriminatory practice.

Legal Analysis: Reprisal

Complainant argues that the MPD engaged in a pattern and practice of reprisal against Katherine and Donald Smulski because they complained about discrimination in violation of Minn. Stat. § 363.03, subd. 7. Subdivision 7 provides in relevant part as follows:

> It is an unfair discriminatory practice for any employer . . . to intentionally engage in any reprisal against any person because that person:
>
> (1) opposed a practice forbidden under this chapter . . .
>
> A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in activities listed in clause (1) or (2): refuse to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

The McDonnell Douglas burden-shifting scheme for analyzing discrimination claims applies to claims of reprisal or retaliation. Hubbard v. United Press Int'l. Inc., 330 N.W.2d 428, 444 (Minn. 1983). Complainant has the initial burden of establishing a prima facie case of reprisal. To establish a prima facie case of reprisal or retaliation, an employee must establish:

> (1) statutorily-protected conduct by the employee;
>
> (2) adverse employment action by the employer; and
>
> (3) a causal connection between the two.

Once the prima facie case is established, the burden of production shifts to Respondent to show some legitimate, nondiscriminatory reason for the reprisals. If Respondent meets this burden, Complainant has the opportunity to show that

Respondent's presumptively valid reasons are in fact a pretext for obscuring discrimination. Hubbard v. United Press Intern. Inc. at 444-45 and Giuliani v. Stuart Corp., 512 N.W.2d 589, 593-94.

A. Retaliation for Voicing Complaints

Donald and Katherine Smulski were forced to separate as partners because of the new approach to squad assignments. They objected to being assigned to Able Squads, objected to the fact that they were not allowed to use their seniority to select Squads and partners like their co-workers. They believed that these personnel actions were being taken against them because of their personal relationship. They made these objections known to Lt. Winslow and other Fourth Precinct supervisors certainly no later than October 22, 1989. (Ex. 28.) Shortly after these complaints, their supervisors initiated a pattern and practice of discrimination by reprisal against them.

Insp. Jones' threats that he would make their lives miserable came about one or two days after Donald Smulski visited Chief Laux. Insp. Jones' threat constituted discrimination by reprisal against Donald and Katherine Smulski because it threatened retaliation if they complained or continued to complain about treatment they believed constituted marital status discrimination. Insp. Jones' threat also constituted marital status discrimination against Katherine Smulski. Donald Smulski, not Katherine Smulski, had complained to Chief Laux about the unfair treatment caused by their Fourth Precinct supervisors. Threatening Katherine Smulski in response to an action taken by Donald Smulski singles out Katherine Smulski solely on the basis of her relationship to Donald Smulski.

Shortly after threatening to make their lives miserable, Insp. Jones made a rare appearance at a roll call attended by Donald and Katherine Smulski. At the roll call he directed Sgt. Diaz to make a note of their "bad attitudes". The close coincidence in time between the complaints of Donald and Katherine Smulski and Insp. Jones' appearance at a roll call where he prompted Sgt. Diaz to note the Smulskis' "negative attitude" support an inference of unlawful retaliatory motive by Insp. Jones. In addition, by encouraging supervising sergeants in the Fourth Precinct to watch Donald and Katherine Smulski closely, Insp. Jones encouraged these supervisors to also engage in retaliation against Donald and Katherine Smulski.

From approximately November 1989 through November 1990, Lt. Winslow essentially placed Donald and Katherine Smulski in a "penalty box". Each month he refused to give them a permanent squad assignment and instead assigned them to Able Squads or to the relief group as "tramps". By not allowing Donald and Katherine Smulski to select Squads and partners, they were discriminated against on the basis of their marital status.

The Judge believes that continuing to treat Donald and Katherine Smulski this way is an independent act of reprisal. Each month Lt. Winslow compiled a monthly assignment sheet. Each month officers had an opportunity to change assignments,

and/or select partners. Winslow knew that Donald and Katherine Smulski did not desire to be assigned to Able Squads or to the relief squad. However, Lt. Winslow drew a penalty box around them that prevented them from making any change. Lt. Winslow departed from the "customary employment practice" of allowing officers to make selections of their Squads and partners.

B. Administrative Tools Used for Reprisal

The Fourth Precinct supervisors used various administrative tools to take reprisal against Donald and Katherine Smulski. The Fourth Precinct supervisors also used various administrative tools to take reprisal against Katherine Smulski and other female officers and to discriminate against them because of their gender. After Donald and Katherine Smulski complained, entries were made into the Sergeant's Notebook about them. Similarly, shortly after female officers complained of discriminatory treatment, they also received numerous entries into the Sergeant's Notebook. Because the Sergeant's Notebook entries were subsequently used as documentary proof of violations, use of the Sergeant's Notebook in this manner constitutes reprisal. The Judge believes that it is the use of the entries to cause an adverse personnel action that makes the Sergeant's Notebook entries a violation of the reprisal provisions of the MHRA. Not informing a person about a Sergeant's Notebook entry and not allowing input from the subject of the entry are poor personnel practices but not a violation of the MHRA. However, insofar as these Sergeant's Notebook entries are used to document any adverse personnel action such as a performance evaluation, those entries constitute discrimination by reprisal.

Fourth Precinct supervisors also used performance evaluations as reprisal and/or discrimination because of sex against Donald and Katherine Smulski and female officers. Fourth Precinct supervisors departed from the standardized guidelines required by the User's Manual. Donald and Katherine Smulski and other female officers received low and unjustified scores on their performance evaluations for the year 1989. An analysis of the performance evaluations themselves shows that the scores were unjustified and were the results of departures from the standardized guidelines. Use of the performance evaluation process in this manner constitutes discrimination by reprisal and sex discrimination.

C. Donald Smulski’s MDT Message

Shortly after Donald and Katherine Smulski’s complaints of discrimination, Donald Smulski's Fourth Precinct supervisors overheard a MDT message that he transmitted. Insp. Jones initiated an IAD investigation into the matter which resulted in disciplinary action against Donald Smulski. The record establishes that other officers who sent personal messages over the MDT communications system were not similarly disciplined. The fact that Donald Smulski received discipline for sending this message establishes that he received different treatment. Therefore, the Judge has concluded that the close coincidence in time between Donald and Katherine Smulski's complaints

and the initiation of IAD Complaint # 89-260 prompts a conclusion that unlawful retaliation was the motive in the discipline of Donald Smulski.

In March 1990, Lt. Winslow threatened Donald and Katherine Smulski. He warned them that if they didn't change their attitude, he would build a case against them using small violations to eventually take their badges and get them terminated from the Department. Lt. Winslow's threat constitutes discrimination by reprisal.

D. Burnsville Police Officer Application

Katherine Smulski's Fourth Precinct supervisors also discriminated her on the basis of sex, marital status and by reprisal in connection with her application for employment with the Burnsville Police Department. Minn. Stat. § 363.03, subd. 7 provides that a reprisal occurs whenever an employer informs "another employer that the individual has engaged in activities listed in clause (1) or (2)." Katherine Smulski's Fourth Precinct supervisors, Lt. Winslow, Sgt. Dallman and Sgt. Larson violated this provision by telling Officer Wareham that she complained about what she believed was unfair discriminatory treatment.

Fourth Precinct supervisors also provided false and incomplete information about the IAD Complaint No. 89-228 investigation. Officer Wareham interviewed the Fourth Precinct supervisors on February 14, 1990. (Ex. 16, 6.) The investigation of IAD Complaint No. 89-228 was completed on December 20, 1989 and the grievance on the complaint was filed January 29, 1990. (Ex. 4, 8-9.) These supervisors knew or should have known that Donald and Katherine Smulski had filed a grievance challenging the one-day suspension. Lt. Winslow volunteered that Donald and Katherine Smulski were disciplined because they "missed a required court appearance". Lt. Winslow knew or should have known that the IAD investigation determined that Donald and Katherine Smulski did not miss a required court appearance. The Judge believes that the failure of Katherine Smulski's Fourth Precinct supervisors to provide complete and accurate information is evidence of retaliatory motives because she opposed discriminatory practices. Therefore, Katherine Smulski's Fourth Precinct discriminated by reprisal by intentionally providing false or incomplete information.

The Judge also notes that the references by Sgt. Dallman and Sgt. Larson regarding Katherine Smulski being the "best female officer", not having a "chip on her shoulder", and not possessing "moxie", are all subtle put-downs of Katherine Smulski because of her gender. This was made apparent by Sgt. Dallman's explanation of why he called her the "best female" officer when comparing her to the entire shift. He could not say that she, for example, was one of the better officers. What he could say was that she's the best female officer.

Finally, the Fourth Precinct supervisors' statements to Officer Wareham all include negative comments about Donald Smulski who had not authorized the release of information relating to him. Providing negative comments such as these is further evidence of retaliatory motivation on the part of the Fourth Precinct supervisors. It

constitutes both discrimination by reprisal and marital status discrimination against Katherine Smulski because it impacts negatively on her because of her association with Donald Smulski.

E. Desk Duty Assignments

Female officers working on the Fourth Precinct C Shift complained that women more often than men were assigned to desk duty. Because the desk assignment was not a desirable assignment and was considered a "penalty box", female officers also believed that they were assigned desk duty as retaliation.

The analysis of desk assignments for the year 1990 is inadequate to establish a conclusion whether or not women were assigned desk duty more often than men in 1989-90. However, the assignment by Sgt. Raiche of desk duty to Katherine Smulski for November 1990 constitutes discrimination on the basis of sex and marital status and discrimination by reprisal. Katherine Smulski complained to Sgt. Raiche about two desk assignments he gave her for the month of November. She asserted that male officers with less seniority than she had received no desk duty.

As a result of her coming in to complain, Sgt. Raiche, instead of reducing her desk time, increased it from two days to four days. Sgt. Raiche took reprisal against Katherine Smulski by assigning her two additional days because her husband, Donald Smulski, had previously complained about the same issue. The assignment constituted sex discrimination because 1) males with less seniority were not assigned to desk duty; (2) the extra days assigned to her were taken from male co-workers; and 3) when complaining about the same thing, Donald Smulski received a satisfactory response as compared to the reprisal against her.

F. Failure to Promote to the Weapons Position

Katherine Smulski enjoyed doing Weapons work. She informed her supervisor, Lt. Smolley, of her interest in doing Weapons work full-time. She also informed Lt. Smolley that she was interested in the Weapons Officer position. The record demonstrates that a Weapons Officer position became available at least three different times, in May 1994 and twice in 1996.

To raise a presumption of discrimination in failure-to-promote cases, a plaintiff must show that (1) she is a member of a protected group; (2) she was qualified and applied for a promotion to an available position; (3) she was rejected; and (4) similarly situated employees, not part of the protected group, were promoted instead. Patterson v. McLean Credit Union, 491 U.S. 164, 186-87 (1989); Marzec v. Marsh, 990 F.2d 393, 395-96 (8th Cir. 1993).

Complainant has established a prima facie case with respect to the MPD's refusal to promote Katherine Smulski to the Weapons Officer position. Katherine Smulski because of her gender is a member of a protected group. Because of her

extensive experience in weapons work, she was qualified for the Weapons Position. She informed Lt. Smolley of her interest in promotion to the position. She was rejected and a male with no experience in weapons work was promoted instead. She was also not considered for the two subsequent Weapons Officer positions. Respondent has articulated no legitimate non-discriminatory reason why Katherine Smulski has not been selected for a Weapons Officer position.

Based on the foregoing, the MPD discriminated against Katherine Smulski on the basis of sex when it failed to select her for a Weapons Officer position.

Legal Analysis: Hostile Work Environment

The Minnesota Human Rights Act prohibits a working environment that allows gender harassment and discrimination. The Minnesota Supreme Court in Continental Can Company, Inc. v. State of Minnesota, 297 N.W.2d 241 (Minn. 1980), stated as follows:

> One of the purposes of the Act is to rid the workplace of disparate treatment of female employees merely because they are female. Differential treatment on the basis of sex is more readily recognizable when promotion or retention of employees is conditioned on dispensation of sexual favors. It is invidious, although less recognizable, when employment is conditioned either explicitly or impliedly on adapting to a workplace in which repeated unwelcome sexually derogatory remarks and sexually motivated physical contact are directed at an employee because she is a female. Repeated, unwarranted, and unwelcome verbal and physical conduct of a sexual nature, requests for sexual favors and sexually derogatory remarks clearly may impact on the conditions of employment. When sexual harassment is directed at female employees because of their womanhood, female employees are faced with the working environment different from the working environment faced by male employees.

Continental Can, 297 N.W.2d at 248 (footnote omitted).

To establish a prima facie case of hostile environmental sexual harassment, a plaintiff must prove that:

1) She belongs to a protected group;

2) she was subjected to unwelcome sexual harassment;

3) the harassment was based on sex;

4) the harassment affected a term, condition, or privilege of employment; and

5) the employer knew or should have known of the harassment and failed to take proper remedial action.

See Kopp v. Samaritan Health Systems, 13 F.3d 264, 269 (8th Cir. 1993); Klink v. Ramsey County by Zacharias, 397 N.W.2d 894, 901 (Minn. App. 1986). Bersie v. Zycad Corp., 417 N.W.2d 288, 290 (Minn. Ct. App. 1987). Appropriate factors to consider in a hostile work environment claim are "nature, frequency, intensity, location, context, duration and object or target in determining its effects on disparate treatment of female workers." Id. Klink v. Ramsey County by Zacharias, 397 N.W.2d at 901. "[T]he key issue in analyzing a hostile-work-environment claim is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994).

The Judge believes that Findings of Fact 145 to 299 establish that the MPD has allowed a hostile work environment for women because of their gender. These Findings demonstrate "nature, frequency, intensity, location, context, duration and object or target" that satisfy the requirements of a hostile work environment claim.

The Judge also believes that these Findings establish that the MPD was placed on notice of the gender harassment and discrimination occurring on its workforce. Finally, the Findings demonstrate that despite this knowledge of gender discrimination and harassment, the MPD failed to take proper remedial action.

The employer may rebut the employee's prima facie showing of a hostile work environment either by (1) proving that the elements did not take place or (2) showing that they were isolated or trivial. These issues relate to whether a hostile environment was in fact created by the employer. Stacks, 27 F.3d at 1326.

Respondent asserts that a prima facie claim of hostile work environmental gender discrimination has not been established. First, it asserts that Katherine Smulski and other female officers did not make contemporaneous complaints and did not inform harassers that the harassment was unwelcome. However, the failure of the victim to register contemporaneous complaints about harassment with supervisory personnel or to verbally inform the harassers that their conduct is unwelcome has not been held to be a bar to a claim for hostile work environmental harassment. See Thompson v. Campbell, 845 F. Supp. 665, 673 (D. Minn. 1994).

Next, Respondent asserts an employer has no duty to maintain a pristine working environment. Relying on Klink, Respondent argues that sexually derogatory language and vulgar behavior in the workplace does not automatically trigger an actionable claim of sex discrimination. Respondent cites dicta from Klink: "Peace officers are going to utter certain epithets which may engender offensive feelings in some employees but merely

overhearing them is clearly not sufficient to state a claim for sexual harassment." Klink, 397 N.W.2d at 902.

This case is easily distinguishable from Klink. Klink involved a victim who was a clerk-typist. The testimony in this case comes from sworn officers at every level who testified as to how their jobs and careers as police officers have been affected by the legacy of Respondent's previous all-male work environment. Thirteen sworn female officers testified, representing a significant percentage of the total number of female officers on the MPD workforce. This case does not only involve overhearing sexually derogatory comments, it involves employees who have modified their conduct on the job to conform, survive and succeed in a hostile working environment.

Contrary to the trial court's view in Klink, the Judge does not believe that there is or ought to be a peace officer exception to hostile work environment discrimination.[24] The Judge does not believe that the Court of Appeals in Klink established a peace officer exception to hostile work environment harassment. To allow a peace officer exception would continue the legacy of the previous all-male work environment. Allowing that legacy to continue has the effect of imposing conditions of employment on female officers that are not imposed on male officers.

Finally, Respondent asserts that because most of the women admitted that they made sexual jokes and remarks themselves, the vulgar language and derogatory comments do not establish or contribute to a hostile work environment claim. However, courts have been reluctant to dismiss claims for hostile work environment harassment based on alleged similarities between the workplace conduct of the harassers and that of the victims. Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993); Thompson v. Campbell, 845 F. Supp. 665, 673 (D. Minn. 1994).

Based on the foregoing, the Judge concludes that the Respondent has failed to rebut Complainant's prima facie showing of a hostile work environment.

VII: Tragic Effects of Exclusion of Women

Law enforcement agencies such as the Minneapolis Police Department enjoy a position of trust. They are presumed loyal and committed to preserving lawful, orderly processes. Law enforcement agencies must set an example for the rest of society.

The Minneapolis Police Department's failure to “fully” integrate women into its work force is a tragedy of enormous proportions. Not only are women officers adversely affected, but the Police Department itself has foregone a substantial opportunity to realize the benefits of inclusion. Full inclusion of women might introduce a vector of change that goes to the heart of law enforcement itself. It could be that if women become a fully integrated part of the work force, the Police Department's view and concept of itself might change. Policing practices toward the community being served might change. The Judge suspects that there are numerous benefits that will accrue to

the Department. Those benefits are incomprehensible and unattainable given the current working environment at the Minneapolis Police Department.

VIII: Damages and Affirmative Relief

A. Compensatory Damages

Minn. Stat. § 363.071, subd. 2, authorizes an award of compensatory damages to the victims of unfair discrimination practices. This section provides in pertinent part:

> In all cases where the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained.

The general purpose of the compensatory damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988); Brotherhood of Railway and Steamship Clerks v. Balfour, 303 Minn. 178, 229 N.W.2d 3, 13 (1975).

Based on Findings 300-302, Donald and Katherine Smulski's compensatory losses amount to $16,733.94. However, the Judge finds that awarding them this amount will not adequately compensate for losses they have incurred.

The Judge finds that Donald and Katherine Smulski have experienced other losses as well. First, the unfair discriminatory practices interrupted two very promising careers in law enforcement. Second, Katherine Smulski lost an opportunity to accomplish a lifelong dream -- work for a smaller suburban police department. Katherine Smulski also lost (in connection with the Weapons Position) the advantage of that position, including the prestige and law enforcement contacts that she could have made.

To make Donald and Katherine Smulski whole would require consideration of the losses identified above. For the foregoing, the Judge concludes that the compensatory loss incurred by Donald and Katherine Smulski must be trebled.

B. Damages for Mental Anguish and Suffering

Complainant has requested no less than $75,000 for mental anguish suffered by Katherine Smulski and $25,000 for Donald Smulski. Minn. Stat. § 363.071, subd. 2 authorizes the Judge to award damages for mental anguish and suffering.

An award of damages for mental anguish and suffering is committed to the discretion of the Judge. Gillson v. State Department of Natural Resources, 492 N.W.2d 835, 842 (Minn. Ct. App. 1992). In Gillson, the Court of Appeals upheld a trial court's award of $100,000 for damages for mental anguish and suffering. Recently, the Judge awarded $100,000 for mental anguish and suffering to a victim of sexual harassment where the mental anguish was based solely on her subjective testimony. Schelin v. PGI Companies, Inc., OAH Docket No. 3-1700-8948-2 (June 28, 1995). In this case, Katherine Smulski has, in addition to her subjective testimony, medical and psychological evidence to support the allegations of pain and mental anguish that she has suffered. Compared to the Schelin case, Katherine Smulski's suffering is over a longer period of time (a little over one year compared to approximately five months), and for Katherine Smulski the mental anguish began to manifest itself physically. Katherine Smulski was repeatedly subjected to reprisals, she was devastated by the refusal to consider her for the Weapons Officer position and she was a victim of a hostile work environment at the MPD.

Katherine Smulski suffered severe life-changing mental anguish defined in great detail in Findings 304-312 as a result of the unfair discriminatory practices committed against her. The Judge concludes that $200,000 is an appropriate award of damages for her mental anguish.

Similarly, Donald Smulski suffered mental anguish as detailed in Findings 313-317 as a result of the unfair discriminatory practices committed against him. The Judge concludes that $25,000 is an appropriate award of damages for his mental anguish.

C. Civil Penalty

Donald and Katherine Smulski have a Civil Right to employment free of marital status discrimination. Katherine Smulski and other female officers have a Civil Right to employment free of gender harassment and discrimination.

Minn. Stat § 363.12, subd. 1 declares the Human Rights policy of the State Of Minnesota. That provision states in part: "It is the public policy of this state to secure for persons in this state, freedom from discrimination; (1) In employment because of . . . sex, [and] marital status . . . ." Subdivision 2 of this section announces:

> The opportunity to obtain employment, housing, and other real estate, and full and equal utilization of public accommodations, public services, and educational institutions without such discrimination as is prohibited by this chapter is hereby recognized as and declared to be a civil right.

(Emphasis added.) In order to preserve and enforce the Civil Rights declared by this section, Minn. Stat. § 363.071, subd. 2 mandates that the Administrative Law Judge

assess a civil penalty against a respondent who has committed unfair discriminatory practices. That provision provides, in part, as follows:

> The Administrative Law Judge shall order any respondent found to be in violation of any provision of section 363.073 to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The Administrative Law Judge shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state.

To determine an appropriate amount for a civil penalty award, the Judge must apply the following criteria established by the legislature for determining the size of civil penalty awards: "the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent." Minn. Stat. § 363.071, subd. 2 (1996). This Order details many violations of the Civil Rights of Donald and Katherine Smulski. These violations occurred as a part of a pattern and practice of committing unfair discriminatory practices by the MPD. The violations were extensive, intentional and in disregard of the Civil Rights of Donald and Katherine Smulski. In addition, this record also demonstrates that the Civil Rights of other female officers were also adversely affected by the MPD's pattern and practice of committing unfair discriminatory practices.

The MPD has been the Respondent in an extraordinary number of discrimination charges between 1989-1995. During this period, as many as six to ten charges of discrimination were filed each year. Approximately 90 percent of the discrimination charges resulted in a determination that "probable cause" existed to believe that unfair discriminatory practices had occurred. This is an extraordinary record that must be reversed. A substantial penalty is appropriate to spur the MPD to address the circumstances that give rise to the charges of discrimination and to deter the MPD from continuing the circumstances.

A substantial part of this record demonstrates a hostile work environment for female officers at the MPD. Although the MPD began to hire women in significant numbers in the late '80s after removal of the college degree requirements, it has not acted to eliminate the vestiges of the previous all-male working environment. The MPD continues to have "substantially all-male" work assignments such as the Canine Unit and the Emergency Response Unit. A substantial penalty is necessary to address the failure of the MPD to fully integrate women into its work force. It is necessary to emphasize that the MPD must do more than eliminate the degree requirement; the MPD must eliminate the vestiges of the previous all-male working environment.

Because of the MPD's role as a law enforcement agency, it enjoys the public trust. Unfair discriminatory practices undermine the integrity and effectiveness of the MPD as a law enforcement agency.

A civil penalty award is by definition a penalty. The purpose of any penalty is to act as a deterrent. For example, in United States v. Chevron U.S.A., Inc., 639 F. Supp. 770 (W.D. Tex. 1985), the court assessed civil penalties totaling $4,530,000 to the federal government and $1,524,000 to the state of Texas against Chevron. The court explicitly stated that in light of the size of Chevron, the large monetary amount was necessary in order to "serve as any deterrent." Id. at 779. This rationale properly justifies a large civil penalty in the present case. The size of the penalty must be sufficient to prevent the MPD from engaging in further unfair discriminatory practices. Furthermore, the civil penalty should properly serve as a deterrent to others. In short, the penalty must be of sufficient size to spur the MPD to seriously address discrimination in its workforce, and serve notice to others that engaging in discriminatory practices carries with it very serious consequences.

Based on the foregoing discussion of the applicable criteria, and considering the large size of the MPD, the Judge concludes that a civil penalty award of $1,500,000 is necessary and appropriate. However, the Judge also recognizes that, unlike Chevron, the MPD is a taxpayer-funded entity, and the penalty will ultimately be paid by the City's taxpayers and to the State's General Revenue Fund. It makes more sense to use the penalty monies to improve the Department and correct the problems identified in this Order. Therefore, the civil penalty of $1,500,000 will be reduced by the amounts expended by the MPD for the Affirmative Relief ordered in paragraph 9 above. Insofar as possible, the Judge encourages the MPD to consult with the Commissioner of Human Rights. On or before January 1, 2000, the MPD shall provide the Judge with an accounting of the monies actually expended in the Affirmative Relief ordered in paragraph 9 above, and supply a copy of the accounting to the Commissioner. Upon review, the Judge shall determine how much, if any, of the $1,500,000 should be paid to the State as a civil penalty.

D. Punitive Damages

Minn. Stat. § 363.071, subd. 2 authorizes the Judge to award punitive damages to a victim of unfair discriminatory practices. The Judge is required to consider factors set out in Minn. Stat. § 549.20. Section 549.20, subd. 1 authorizes an award for punitive damages when there is "clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others."

Minn. Stat. § 549.20, subd. 3 provides as follows:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the

> duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Applying the standards from above, the Judge concludes that the record contains clear and convincing evidence that the MPD has engaged in actions that show a deliberate disregard for the protected Civil Rights of Donald and Katherine Smulski. Donald and Katherine Smulski had to endure the attitude and conduct manifest in these activities for approximately one year. The Judge specifically concludes that the actions of Insp. Jones and the Fourth Precinct supervisors that resulted in the termination of their partnership, the refusal to allow them to select Squads and partners and retaliatory actions taken against them when they objected; these actions show a callous disregard for the Civil Rights of Donald and Katherine Smulski.

Based on the foregoing, the Judge concludes that an award of $8,500 to Donald Smulski and $8,500 to Katherine Smulski as punitive damages is appropriate in this case.

E. Litigation and Hearing Costs

Minn. Stat. § 363.071, subd. 7 requires that the Administrative Law Judge order a respondent who has engaged in unfair discriminatory practices to reimburse the Minnesota Department of Human Rights for "all appropriate litigation and hearing costs expended...unless payment of the costs would impose a financial hardship on the respondent." The Judge has directed the Department of Human Rights to supply an accounting of the litigation and hearing costs incurred by the Department in connection with this proceeding. The Judge has also provided an opportunity for the City of Minneapolis to submit a claim for financial hardship. Complainant shall update appropriate litigation and hearing costs will be awarded by the Judge. After these filings are reviewed, the Judge will rule on the appropriate award for these costs.

F. Attorney's Fees

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to make an award of attorney's fees. The Judge has directed counsel for Complainant to provide an accounting of attorney's fees and costs. He has also directed Complainant to submit a petition that would be sufficient to allow the Judge to make findings consistent with the legal principles developed in Johnson v. Georgia Highway Express,

Inc., 488 F.2d 714 (5th Cir. 1974). In a subsequent Order, the Judge will award appropriate and reasonable attorney's fees and costs.

G. Affirmative Relief

Minn. Stat. § 363.071, subd. 2 provides in part:

> [I]f the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to *take such affirmative action as in the judgment of the administrative law judge will effectuate the purposes of this chapter.*

(Emphasis added.) This provision authorizes the Judge to order affirmative relief to prevent unfair discriminatory practices from occurring again. The purpose of the MHRA is described in § 363.12, subd. 1, which provides in part: "It is the policy of this state to secure for persons in this state freedom from discrimination; . . . In employment because of race, color, creed, religion, national origin, sex, marital status, disability, status in regard to public assistance and age." In light of the policies of the MHRA, it is imperative in the present case that affirmative relief be granted.

Upon finding that an employer has engaged in intentional discrimination, a court is duty bound to ""render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), and nothing less than "the most complete relief possible under the circumstances" will fulfill that obligation. Franks v. Bowman Transportation Co., 424 U.S. 747, 764 (1976). In cases such as the instant matter in which there is abundant evidence of consistent past discrimination, injunctive relief including measures designed to correct and eliminate the present effects of past discrimination, is mandatory absent clear and convincing proof that there is no reasonable probability of future non-compliance with the law. N.A.A.C.P. v. City of Evergreen, Alabama, 693 F.2d 1367, 1370 (11th Cir. 1982).

As discussed at length above, the MPD is an organization filled with past and present practices, policies, and procedures which allow discrimination to perpetuate. The Commissioner has requested substantial relief, most of which has been ordered.

Motion to Dismiss

On September 13, 1996, after 12 days of trial, the Judge called the parties into Chambers and recommended that they reconsider the possibility of settlement. At this time, the parties were contemplating as much as 20 to 30 days of additional testimony. To aid the parties in the consideration of settlement, the Judge attempted to give the parties his assessment of the flow of evidence. He pointed out that based on the

testimony elicited to that date, it appeared that the Commissioner had presented a prima facie case on each of the three counts alleged in the Complaint.

A motion for mistrial was made subsequently by the City.[25] The basis for this motion is that the Judge's recommendation that the parties consider settlement constitutes an expression of bias.

Complainant maintains that the City's motion is frivolous and should be denied.

The procedure for removal of an administrative law judge in a contested case proceeding is identified in Minn. Rules 1400.6400. The rule contemplates that a Judge who considers him or herself disqualified for any reason will withdraw from participation in a contested case proceeding. The rule also recognizes that a party may file an affidavit of prejudice to remove a judge in a particular case. However, the request must be made "no later than five days prior to the date set for hearing". Therefore, the Judge believes that there is no procedural basis for removal of a judge in the middle of a contested case proceeding. The Judge also believes that bias is not shown by recommending that the parties consider settlement or by making initial impressions about evidence.

AEG

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[1] The Court of Appeals has expressed a preference that decisions in Human Rights Act proceedings should combine liability and damage/financial issues before the issuance of a final decision. See, for example, Schelin v. PGI Companies, Inc., OAH Docket No. 3-1700-8948-2 (June 28, 1995), Court File No. _____. The Court of Appeals has suggested that a Human Rights Act appeal is not ripe for consideration unless findings and conclusions address all the liability and damage issues. Therefore, the final decision in this case is not being rendered until the damage issues are finally determined. See attached Order, paragraph 1(c).

[2] Throughout this Report references to the oral testimony will identify the Witness, Transcript Volume and page number.

[3] The word "Squad" is defined as "A Department Police Vehicle" or a "marked police vehicle". (Ex. 13, 31; Winslow, V. 28, 4856.)

[4] Inspector Jones is currently a Deputy Chief. He will be referred to by either of these titles: "Inspector" or "Deputy Chief".

[5] The term "Inspector" refers to persons appointed by the Chief of Police and are superseded in rank only by Deputy Chiefs. Inspectors serve as a department-wide management resource for the Chief of Police. They may have specific areas of responsibilities such as the command of precincts and/or divisions or any management task or assignments that the Chief of Police may direct. (Ex. 13, 35.)

[6] (See Ex. 1, 2, Monthly Assignment Sheet for November 1989; Ex. 3, seniority list.) Officer Creighton, the officer with the most departmental seniority, picked Squad 410 with Officers J. Johnson and J. Lavigne, the number two and three officers in order of seniority, respectively. Officer Weitzel, fourth in departmental seniority, requested and was granted an Able Squad assignment, Squad 411. (Id.) Officer

Gordon, fifth in seniority, picked Squad 420 with Officers Christensen and Kvelland. Next was Officer Ketzner, who was sixth in seniority. (Id.) She picked Squad 440 with Officers Clemons and Vreeland. Officer Nelson, seventh in seniority, selected Squad 431, an Able car. (Id.) At this point, the next picks should have gone to Donald and Katherine Smulski, who were eighth and ninth in seniority. (K. Smulski, V. 1, 113-14.) There were still four three-person Squads available to choose from (430, 441, 450, and 460.) Instead, the pick skipped to Harris, who was tenth in seniority, and proceeded on down the seniority line from there. (K. Smulski, V. 1, 115-17; Ex. 1; Ex. 3.)

[7] For example, for November 1989, two of Squad 410's three officers have six of the same days scheduled off and two of Squad 420's three officers have seven days scheduled off the same. (Id.) For December 1989, two of Squad 410's three officers have seven days scheduled days off the same and two of Squad 440's three officers have seven days scheduled off the same. (Id.) These examples only cite scheduled off days, indicated by an "O" on the Monthly Assignment Sheet. If scheduled vacation days are included (indicated by a "V"), the number of days on which two or more of the officers assigned to a three-person Squad were not present to work the Squad is even greater.

[8] This statement supports the contention that the order to split up Donald and Katherine Smulski was motivated by concerns about their personal relationship.

[9] As commander of the Fourth Precinct, Inspector Jones was in charge of four shifts -- A, B, C and Power. There were three to four roll calls per day at the Fourth Precinct. (Jones, V. 24, 4153.) As commander, it was not his practice to attend roll calls. In fact, Inspector Jones estimated that he attended no more than one roll call per month. (Jones, V. 24, 4154.) Given that each of the four shifts held their own roll calls, officers on any given shift might reasonably expect to see Inspector Jones at one of their roll calls no more than once every four months.

[10] Sgt. Donald Harris described the Desk Assignment at the Fourth Precinct C Shift as a "penalty box". (Harris, V. 14, 2466.) He stated: "If you were working the desk, you must have done something to make the sergeants angry." (Id.) See also, the description of a “penalty box” described by Captain William T. Berg. (Berg, V. 15, 2645.)

[11] See testimony of Sgt. Violette. (Violette, V. 33, 5732-38.) Other Sergeant Notebook entries are found, for example, in other exhibits, including Exhibit 6, Donald Smulski's precinct file. Entries relating to Officer Mary Ketzner are contained in Exhibit 39; entries relating to Officer Alisa Clemons are contained in Exhibit 47.

[12] This is the same Crack Team drug bust where women officers on the team were sent to a street corner while the men officers, armed with specially scrambled radios, were poised for a raid. See Finding 214. The arbitrary separation of officers by sex in this manner is another example of gender discrimination, particularly in a circumstance where the women were assigned to an area where their male supervisors knew that they had no real opportunity to be involved in the potential apprehension of a suspect.

[13] Padding had become such a problem on the Fourth Precinct that a memo was sent out to all four shifts warning supervisors and officers to counter the practice. (Id.) Officers working the desk got no points. Despite these flaws, Fourth Precinct supervisors relied heavily on the monthly statistics in scoring officers on the annual performance evaluation. (Dallman, V. 17, 2980.)

[14] During the relevant time period, there were 22-23 people on the C Shift. (Olson, V. 11, 1966.) At least 60 percent of those people attended roll call on a daily basis. (Olson, V. 11, 1967.) But not one of those persons was ever contacted or interviewed.

[15] However, Katherine Smulski did not cover the desk nine times for a variety of reasons, including her transfer out from the Fourth Precinct.

[16] As an Inspector, Jones was essentially an appendage of the Chief of Police -- he had very little option for independent action. Because he was an Inspector, he frequently conferred with the Chief’s Office. He

may have conferred with the Chief's Office as early as the time the communications problem first came to his attention on October 12. Given the Chief's view on cohabitation, this would account for his focusing on Donald and Katherine Smulski's cohabitation/personal relationship, instead of the communications problem.

[17] The Judge believes that there were ongoing discussions between Jones and other supervisors. Documentary testimony and Katherine Smulski's testimony establish that Insp. Jones wrote a memo to Fourth Precinct supervisors relating to Donald and Katherine continuing to work together as partners. The memo is referred to by Sgt. Violette in Ex. 28, 2, and again in the testimony of Katherine Smulski where she indicates that Lt. Winslow was waving a memo from Insp. Jones at the meeting in which Lt. Winslow split them up and assigned them to Able Squads. (Smulski, V. 1, 122.) The memo is not a part of the documentary testimony in this proceeding.

[18] Not only was Lt. Winslow's testimony memorable, it puzzled the Judge: how do you reconcile Lt. Winslow's passionate opposition to Able Squads, yet his assignment of Able Squads to Donald and Katherine Smulski for most of the year 1990. His testimony provides the answer to this question. The Judge believes that Lt. Winslow spoke with such passion about this topic because he continued to be angry about what happened.

[19] Unlike Jones, who was an appointee of the Chief of Police, Winslow as a shift-commanding civil service certified lieutenant, had a reasonable expectation of independence to act as shift commander within the confines of his responsibilities and job description.

[20] Insp. Jones made a statement during trial that made a connection between their personal relationship and their working together as partners. He stated as follows: "I felt that, because these two officers had a history of not appearing for court, because -- that as a team, they jeopardized court cases. If they are not working together, if one of them did not report for a court case, it would not be quite as critical if one of the witnesses was not there, but because they were working together as a team, they were arresting people together, that it would be almost an injustice for me to let them work together, continue to work together." (Jones, V. 23, 3890.) The City provided no further explanation of what this statement means or how it applies to the case.

[21] Plaintiffs who have direct evidence of discriminatory intent need not resort to the McDonnell Douglas method for analyzing circumstantial evidence. Feges v. Perkins Restaurant, Inc., 483 N.W. 2d 701, 710 n. 4 (Minn. 1992); State by Cooper v. Hennepin County, 441 N.W. 2d 106, 110 n. 1 (Minn. 1989).

[22] The Minnesota Supreme Court has specifically noted that the burden involved in establishing a prima facie case of discrimination, is not onerous. Dietrich, 536 N.W. 2d at 323.

[23] This order and allocation of proof is the same as that which is applied by the federal courts in disparate treatment cases under Title VII. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). The Minnesota appellate courts have stated that because of the similarities between Title VII and the Minnesota Human Rights Act, Title VII may be used for guidance in interpreting the Minnesota Human Rights Act. Continental Can Co., Inc. v. State, 297 N.W. 2d 241, 246 (Minn. 1980); Danz v. Jones, 263 N.W. 2d 395, 398-99 (Minn. 1978); Kalia v. St. Cloud State University, 539 N.W. 2d 828, 834 (Minn. App. 1995).

[24] The trial judge in the Klink case observed that the Minnesota Supreme Court in Continental Can did not require "a pristine environment" and concluded, "the [supreme] court obviously recognized that we cannot by legislative or judicial fiat alter the effects of years of human conditioning. Certain attitudes, beliefs, language and conduct by some persons will often be offensive and objectionable to others." Klink at 900.

[25] Because the Judge did not understand the procedural basis for such a motion (in the middle of the trial) and could not get counsel to explain orally at hearing the basis for such a motion, he requested that the City commit the argument to writing, and said that the matter would be taken under advisement.